

2

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 448

THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

vs.

HANCOCK TRUCK LINES, INC.

No. 449

REGULAR COMMON CARRIERS CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC., APPEL-  
LANT

vs.

HANCOCK TRUCK LINES, INC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA

FILED SEPTEMBER 9, 1944

3





**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 448**

**THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS**

**vs.**

**HANCOCK TRUCK LINES, INC.**

**No. 449**

**REGULAR COMMON CARRIERS CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC., APPEL-  
LANT**

**vs.**

**HANCOCK TRUCK LINES, INC.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA**

**INDEX**

	Original	Print
Record from D. C. U. S., Southern District of Indiana.....	1	1
Caption [omitted in printing].....	1	1
Complaint.....	3	1
Exhibit "A"—Report and order of Commission in Docket No. MC-3339, Oct. 7, 1942.....	21	12
Exhibit "B"—Report and order of Commission on re- consideration, Aug. 4, 1943.....	23	22
Exhibit "C"—Order of Commission postponing effec- tive date of order.....	25	50
Exhibit "D"—Order of Commission denying petition for further postponement of effective date of order.....	26	51
Stipulation re extending effective date of order.....	29	52

Record from D. C. U. S., Southern District of Indiana—Contd.		Original	Print
Designation of Judges.....		31	53
Answer of defendant United States of America.....		33	53
Answer of defendant Interstate Commerce Commission.....		38	55
Plaintiff's reply to Paragraph X of the answer of Interstate Commerce Commission.....		46	59
Petition for leave to intervene of Regular Common Carrier Conference of the American Trucking Assns., Inc. ....		48	60
Order granting petition to intervene.....		50	61
Submission of cause to Three Judge Court.....		50	61
Proposed Findings of Fact and Conclusions of Law submitted by defendants United States and Interstate Commerce Commission.....		52	61
Appearance filed by Claude H. Anderson, Attorney for Indianapolis & Southern Motor Express, Inc., and Adkins Transfer Co.....		53	64
Oral argument of counsel heard.....		59	65
Filing of Court's Special Findings of Fact and Conclusions of Law.....		60	65
Court's Findings of Fact and Conclusions of Law.....		61	65
Court's Decree.....		74	74
Petition for Appeal filed by defendants United States and Interstate Commerce Commission.....		76	74
Assignment of Errors filed by defendants United States and I. C. C.....		79	75
Order allowing petition for appeal filed by defendants United States and Interstate Commerce Commission.....		105	78
Citation on Appeal filed by defendants United States and Interstate Commerce Commission [omitted in printing].....		106	78
Notice of appeal to Attorney General of State of Indiana, filed by defendants United States and Interstate Commerce Commission.....		112	78
Præcipe for transcript of record filed by defendants United States and Interstate Commerce Commission.....		119	79
Petition for appeal filed by intervening defendant, The Regular Common Carrier Conference of the American Trucking Associations, Inc.....		127	81
Assignment of errors of intervening defendant.....		129	82
Order allowing petition for appeal filed by intervening defendant.....		158	84
Citation on appeal filed by intervening defendant [omitted in printing].....		159	84
Notice of appeal to Attorney General of State of Indiana, filed by intervening defendant.....		164	84
Stipulation for transmission of original exhibits.....		210	86
Cost Bond on Appeal filed by intervening defendant Regular Common Carrier Conference of the American Trucking Associations, Inc. [omitted in printing].....		212	86
Præcipe filed by intervening defendant.....		215	86

# INDEX

III

Record from D. C. U. S. Southern District of Indiana—Contd.	Original	Print
Reporter's Transcript of the Evidence given on the Hearing.....	221	88
Caption and appearances.....	223	89
Plaintiff's offers in evidence.....	224	89
Defendants' offers in evidence.....	243	96
Plaintiff's exhibits:		
E and G—Applications of Globe Cartage Co., Inc., to I. C. C. in Docket No. MC 3339 and 3340, together with certain orders of I. C. C. [omitted in printing].....		97
F—Report and order of I. C. C. in Docket No. MC-F-1743, May 16, 1942.....	422	99
Defendant Commission's exhibits:		
No. 2—Petition for reconsideration in Docket No. MC 3339.....	430	105
No. 1—Petition for reconsideration in Docket Nos. MC 3339 and 3340.....	434	107
No. 3—Applicant's reply to petition for reconsideration in Docket Nos. MC 3339 and 3340.....	445	115
No. 4—Petition for reconsideration in Docket Nos. MC 3339 and 3340.....	455	120
No. 5—Applicant's reply to petitions for leave to intervene and for reconsideration in Docket Nos. MC 3339 and 3340.....	463	125
No. 6—Petition for reconsideration in Docket Nos. MC 3339, 3340 and 25567.....	467	127
Clerk's certificate [omitted in printing].....	493	144
Statement of points to be relied upon and designation of record—Case No. 448.....	494	144
Statement of points to be relied upon and designation of record—Case No. 449.....	496	145
Stipulation regarding printing of record.....	500	148
Order postponing further consideration of the question of jurisdiction.....	502	150



1 [Caption omitted.]

3 In the District Court of the United States for the  
Southern District of Indiana, Indianapolis Division

Civil Cause No. 795

HANCOCK TRUCK LINES, INC., PLAINTIFF

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,  
DEFENDANTS

*Complaint for Injunction*

Filed March 29, 1944

1.

The plaintiff, Hancock Truck Lines, Inc., complains of the defendants, United States and the Interstate Commerce Commission, and for cause of action herein says:

1. The plaintiff, Hancock Truck Lines, Inc., is a corporation duly organized and existing under the laws of the State of Indiana, and has been such since 1933, with its principal office and place of business in the City of Evansville, Vanderburg County, Indiana, and with an office in the City of Indianapolis, in Marion County, Indiana, and it is a citizen and resident of said District Court for the Southern District of Indiana.

2. The defendant, Interstate Commerce Commission, is a Commission created and established by Congress, having a general regulation, supervision and control over common carriers of property by motor vehicles for hire, with the power and authority to make findings of fact, enter legal and lawful orders, and  
4 issue certificates of public convenience and necessity to such common carriers, as is particularly provided for by part II of the Interstate Commerce Act, and the said Interstate Commerce Commission will at times hereinafter be referred to as the Commission.

3. This action arises under the Fifth Amendment to the Constitution of the United States and under the laws of the United States, and more particularly under Section 205 (h) of the Motor Carrier Act of 1935, now Section 205 (g) of Part II of the Interstate Commerce Act (U. S. Code, Sup. 1, Title 49, Section 305 (h)), and under the Acts of Congress, Code of Laws of the United States, Title 28, Section 41 (28), 32 to 48, inclusive. Plaintiff hereby seeks to enjoin, set aside, annul and restrain the enforce-



ment of part of a certain order of the Interstate Commerce Commission, being order No. MC 3339, entitled Globe Cartage Company Inc. Common Carrier Application, which was approved on the 4th day of August 1943, and later modified to become effective on the 31st day of March 1944, and which proceeding is now designated by the Commission as No. MC 25567 (Sub No. 8), Hancock Truck Lines, Inc., successor to Globe Cartage Company Inc.

4. Throughout the period of plaintiff's corporate existence, it has been, and is now, a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign commerce of general commodities, with certain usual exceptions, for compensation, and has been, and is now, the holder of certain certificates of

5 public convenience and necessity issued to it by the defendant, Interstate Commerce Commission, different from the certificate and order of the Commission hereinafter complained of in this complaint, but which are directly related thereto because of the business which the plaintiff is operating pursuant to all of its certificates:

5. Plaintiff further avers that on or about the 29th day of January, 1936, an Indiana corporation known as Globe Cartage Company, Inc., having its general office and principal place of business in Indianapolis, Marion County, Indiana, filed its written application with the defendant, Interstate Commerce Commission, under the grandfather clause of Section 306 of Title 49 U. S. C. A., duly alleging that it was in fact in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory for which such application was so made by it, and had so operated since that time down to the filing of its said application, such application and proceedings being entitled "Globe Cartage Company, Inc., Common Carrier Application" and bearing No. MC 3339, and wherein it requested said Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by said corporation to the Commission in all respects as provided for in Paragraph (b) of Section 206 of Part II of the Interstate Commerce Act aforesaid, and within 120 days after October 1, 1935; that proceedings were had in relation to such application which resulted in a reference of said application to an examiner

6 by said Commission; thereafter, evidence was heard by said Examiner, report was made to the Commission, and under date of October 7, 1942, Division 5 of the defendant, Interstate Commerce Commission, decided that said applicant was

entitled to continue operations as a common carrier by motor vehicle of general commodities between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, and Pennsylvania, over regular routes by reason of having been so engaged on June 1, 1935, and continuously since, a copy of the findings of fact, and the decision of said Division 5, dated October 7, 1942, aforesaid, being filed herewith, marked "Exhibit A," and made a part of this complaint.

6. Said Division No. 5 of the Interstate Commerce Commission made and adopted its special findings of fact, wherein, among other things, it was found by said Division 5 that on June 1, 1935, said Globe Cartage Company, Inc., was, and continuously since had been, in bona fide operation as a common carrier by motor vehicle, in interstate and foreign commerce, over certain of the routes described in said application, particularly described in said findings, which finding of fact is now set out herein as follows:

"We find that on June 1, 1935, applicant was, and continuously since has been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, (1) between Chicago, Ill., and St. Louis, Mo., (2) between St. Louis and Cincinnati, Ohio, (3) between Louisville, Ky., and Cincinnati, (4) between Indianapolis, Ind., and Cincinnati (5) between Indianapolis and Cleveland, Ohio, (6) between St. Louis and Dayton, Ohio, (7) between Louisville and Indianapolis, (8) between St. Louis and Louisville, (9) between St. Louis and Cleveland, (10) between St. Louis and Pittsburgh, Pa., (11) between Indianapolis and St. Louis, (12) from Akron, Ohio to St. Louis, (13) from Indianapolis to Detroit, Mich., (14) from Indianapolis to Pittsburgh, (15) between Louisville and Pittsburgh, (16) between Louisville and Chicago, Ill., (17) between Indianapolis and Chicago, (18) between Cincinnati and Chicago, (19) from Chicago to Pittsburgh, (20) between Detroit and Louisville, (21) from Cleveland to Pittsburgh, (22) between Buffalo, N. Y., and St. Louis, and (23) between Buffalo and Indianapolis, over the routes described in appendix B hereto, serving East St. Louis, Ill., and Middletown and Hamilton, Ohio, as intermediate points; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that in all other respects the application should be denied."

7. Said Division No. 5 further found in said findings of fact that it could not, consistently with said applicant's common carrier status, restrict its services to particular shippers, namely, freight forwarders, and that to restrict the traffic which it might transport to shipments made by freight forwarders would, in effect and result, be a restriction of applicant's services to such forwarders.

8. Said Division 5 thereupon found and concluded that upon compliance by applicant with the requirements of Section 215 and 217 of said Act, and of the Rules and Regulations of said Commission thereunder, that an appropriate certificate in conformity with such findings would be issued to it, all as is more particularly set out in said Exhibit A aforesaid, in Appendix B thereof.

9. Thereafter, further proceedings were had in relation to said application, and the defendant, Interstate Commerce Commission, upon petitions filed by protestants for reconsideration of such findings and conclusions, vacated and set aside the order entered by Division 5, and upon such reconsideration the Commission entered its report and order showing the same to have been decided as of August 4, 1943, and a copy of the Commission's findings, conclusions and order of August 4, 1943, is attached hereto, marked Exhibit B, and made a part thereof.

10. The Commission in all respects confirmed the findings of fact of said Division No. 5 to the effect that said applicant, Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, except commodities in bulk and those of unusual length, height or weight; it further found as a fact that said applicant was a common carrier by motor vehicle, and further confirmed and ratified the finding of Division 5 that the Commission could not, consistently with applicant's common carrier status, restrict its services to particular shippers; said Commission further found as a fact that said applicant, Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that said Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier.

11. That contrary to the findings above set forth, the Commission did place certain restrictions in said order of August 4, 1943, limiting the transportation to be performed in the future by the plaintiff to those general commodities which are at the time moving on bills of lading of freight forwarders, and specific reference is made to Sheet 5 of Exhibit B, from which the following is set forth:

"On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk and those of unusual length, height or weight) which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports."

The only reason advanced by the Commission for the inclusion of such restriction being, as plaintiff understands, that the previous operations of Globe Cartage Company Inc. had been confined exclusively to the receipt of such general commodities from Universal Carloading and Distributing Company, a freight forwarder, and that it must therefore be limited and confined to the receipt of such general commodities from freight forwarders, but which reason is believed by plaintiff to be wholly without right, and contrary to law, as is more fully shown later herein.

12. That further proceedings were had by said Commission in said matter, and a petition to modify the effective date of said order was filed, and on February 21, 1944, the Commission entered its order in said proceedings indicating that the order entered in said proceedings on August 4, 1943, as subsequently modified to become effective February 29, 1944, so far as it denied the application, be, and it is hereby, further modified so as to become effective on March 31, 1944, and then by order dated the 13th day of March 1944, but not made public until on or about March 23, 1944, and received by plaintiff through the United States Mails March 24, 1944, denied the said petition to modify the effective date of the said order beyond March 31, 1944, and said order is now a final order. A copy of the order of the Commission, as of the 21st day of February, 1944, is attached hereto, marked "Exhibit C," and made a part hereof, and there is also attached hereto the order of the Commission dated as of the 13th day of March 1944, marked "Exhibit D," and made a part hereof.

13. Plaintiff further avers that while said proceedings of Globe Cartage Company Inc. were pending before said Commission in said Cause No. MC3339, that it acquired all of the common carrier operating rights of the said Globe Cartage Company, Inc., and that such transaction was with the Commission's approval by formal report and order, dated as of May 16, 1942, in proceeding numbered MC-F 1743, and such operating rights were duly and legally acquired by, and transferred to this plaintiff, Hancock Truck Lines, Inc., and it is now the successor in interest of all the rights of said Globe Cartage Company, Inc., and ever since the consummation of the transaction shortly after the last named date, plaintiff has been, and is now, the sole owner of all of said rights of Globe Cartage Company, Inc., and of all rights, privileges and grants to which Globe Cartage Company, Inc., would have been entitled to, under and pursuant to the proceedings in its said application for said certificate in Cause No. MC-3339 aforesaid, and plaintiff is therefore now interested in said proceedings, and in said final order, and will be the sole owner of such certificate as is issued thereunder, and the said proceeding in No. MC-3339



is referred to by the Commission as now No. MC 25567 (Sub. No. 8) Hancock Truck Lines Inc., successor to Globe Cartage Company, Inc.

11 14. That the said Commission, by its own act, has included in the report and order of August 4, 1943, a reference to, and has decided the rights of another applicant, in this to wit: the Barnett Trucking Company applications No. MC 70614 and MC 23458; and plaintiff avers that said Barnett Trucking Company is an utter stranger to it and was not a party of record in the proceeding numbered as MC 3339 hereinbefore referred to, and upon recent investigation plaintiff has discovered that the effective date of the order, as it refers to the Barnett Trucking Company, has been modified so as to become effective June 30, 1944, instead of March 31, 1944; the effective date as to this plaintiff.

15. Plaintiff now further avers that that part of said final order of the defendant Commission which attempts to restrain, restrict and confine the operations authorized by it as a common carrier of general commodities, to such general commodities which are at the time moving on bills of lading of freight forwarders, is illegal and void and the Interstate Commerce Commission, in making and issuing said part of said order, exceeded the power and authority delegated to it by the Interstate Commerce Act, or by any other Act or law, and said Commission erred as a matter of law by inserting in said order the words following, viz., "which are at the time moving on bills of lading of freight forwarders," and it is this particular and specific part of said order of which the plaintiff complains in this action, and which it now alleges, is void as being in excess of the power and authority of the Commission, for the following reasons:

12 a. The Commission having found as a fact that the applicant, Globe Cartage Company, Inc., predecessor in interest of plaintiff, was a common carrier by motor vehicle and as such was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory described in number 6 of this complaint, and for which an application for a certificate had been made as aforesaid, and had so continuously operated since that time, it was the statutory duty of the Commission to issue a certificate of public convenience and necessity to such applicant, or to this plaintiff as its successor in interest, without further proceedings, and without inserting either in the order therefor, or in such certificate, the words "which are at the time moving on bills of lading of freight forwarders," and the Commission had no power, right or authority to insert and include said words in said order, or to include the same in the certificate when issued.



b. The inclusion of said quoted words in said order, and in said certificate, is an unlawful and illegal restriction against and constraint upon plaintiff, not authorized by law, and is an unjust, unreasonable, and capricious limitation upon the rights, privileges and duties of the plaintiff as a common carrier of general commodities by motor vehicle for compensation, and will deprive plaintiff of its rights and property without due process of law in violation of the Constitution of the United States and the Fifth Amendment thereto.

c. The attempt by the Commission to limit the operations of the plaintiff by the terms of said order to commodities which are at the time moving on bills of lading of freight carriers, is an illegal and unreasonable limitation and restriction, 13 and is a violation of that part of Section 206 of said Act which mandates the Commission to issue such certificate, without further proceedings, where, as in this case, the Commission found as a fact that Globe Cartage Co., Inc., was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes designated, and had so operated since that time, and upon such findings of fact, the Commission had no power, authority, or discretion under said act to make any order, or embody within such certificate, a provision limiting the rights and duties of such common carrier to commodities at the time moving on bills of lading of freight forwarders. Such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against the plaintiff as a common carrier by motor vehicles, and is contrary to public policy.

16. Plaintiff further avers that as such common carrier of property by motor vehicles it has and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and enforced just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation 14 of property in interstate and foreign commerce, and has fully complied with all the rules and regulation of the Commission in relation thereto insofar as they are in effect at this time, and as such common carrier it is prohibited by law from making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district territory, or description of traffic, in any respect what-

soever, and, as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates.

17. Plaintiff now further alleges that notwithstanding the matters and things hereinbefore alleged as to the invalidity and illegality of said part of said order, the defendants, and each of them, is threatening to enforce that part of said order thus complained of herein, and unless they are restrained and enjoined by this court they will enforce said void, illegal and invalid part of said order; that plaintiff has exhausted all of its remedies before the defendant, Interstate Commerce Commission, as provided by law and as provided by the rules and regulations of said Commission.

18. That the enforcement of the void part of said order aforesaid on March 31, 1944, by said defendants, will cause immediate and irreparable injury, loss and damage to result to this plaintiff before notice can be served, and a hearing had herein, as is more particularly shown by the following specific facts:

15 The original application of Globe Cartage Co., Inc., in Cause No. MC-3339 was filed before the Commission on or about January 29, 1936, and as of June 1, 1935, it operated 172 units, consisting of 85 tractors, 84 semitrailers, and three straight trucks; at the time of the hearing before Division 5, its business had increased and it was then operating approximately 202 units, consisting of 102 tractors, 92 semitrailers and 8 "spotting" tractors; it had built up a large volume of business over the routes described in number 6 herein, consisting of the transportation of general commodities tendered to it by the Universal Carloading and Distributing Company, as a freight forwarder, and which business was in existence at the time plaintiff purchased and thus acquired the interest of Globe Cartage Co., Inc., as set out in number 13 hereof, and all of said business was purchased by plaintiff as aforesaid, and it passed to, and became the property of this plaintiff.

At that time, plaintiff had certain certificates of public convenience and necessity which authorized the transportation of general commodities between Chicago, Illinois, and Evansville, Indiana, serving all intermediate points along U. S. Highway 41, including that of Vincennes, Indiana; and from St. Louis, Mo., to Louisville, Kentucky, serving certain intermediate points, of which there was included that of Vincennes, Indiana; and from Indianapolis, Indiana, to Terre Haute, Indiana, serving all intermediate points along U. S. Highway 40, meeting with the Chicago-

Evansville route at Terre Haute, Indiana; and a route from Indianapolis, Indiana, to Vincennes, Indiana, via Indiana Highway 67, which is the direct route; and route between Indianapolis, Indiana, and Evansville, Indiana, over a direct route; and also from Evansville, Indiana, to St. Louis, Mo., over a direct route, and your plaintiff in keeping with these certificates has operated continuously over those routes, as well as the routes as are involved in the Order which is here the subject of complaint.

16 Your plaintiff for many years last past, and even prior to the acquiring of the rights from the Globe Cartage Company, Inc., did through its efforts establish a substantial business between Indianapolis and St. Louis, Mo., including intermediate points particularly that of Terre Haute, Indiana, and also between Louisville and Indianapolis, and Louisville and Chicago. The effect of the Order of the Commission which is to become effective March 31, 1944, would destroy in one sweep a large part of the business that your plaintiff through years of effort was able to establish, and for specific examples, it is here indicated that the approximate annual business as handled by your plaintiff between Indianapolis, Indiana, and St. Louis, Mo., is 13,200,000 lbs., out of which amount approximately sixty (60%) percent represents tonnage tendered to your plaintiff by others than freight forwarders; and between Louisville, Kentucky, and Chicago, Illinois, giving consideration to the intermediate point of Indianapolis, Indiana, the approximate yearly tonnage was 34,660,000 lbs., of which quantity approximately fifty (50%) percent was that tendered to plaintiff by others than freight forwarders. From Cincinnati, Ohio, to Chicago, Illinois, your plaintiff has handled in the past approximately 5,760,000 lbs. of property per year that was not moving on freight forwarder bill of lading; and if said part of said Order here complained of is enforced on March 31, 1944, plaintiff will thereupon at once be deprived of valuable operating rights which it believed it was acquiring in said purchase from Globe Cartage Company, Inc. as aforesaid, and it will suffer a further loss and damage of approximately \$75,000.00 per year on account of loss of revenue on said routes and will destroy its right to receive such general commodities direct from the true owners thereof rather than through the agency of freight forwarders.

17 The Order of the Commission, if allowed to become effective, will be tantamount to dividing the shipping public into classes, considering on the one hand as a part of the general public the freight forwarders, and, on the other hand, the remainder of the shipping public, and, further would present the peculiar sit-

uation of the tonnage moving on freight forwarder bills of lading moving over one route, and that from the remainder of the shipping public over an entirely different route, and particularly would this be true on movements between Indianapolis, Indiana and St. Louis, Mo. and between Louisville, Kentucky and Chicago, Illinois, giving consideration to the intermediate point of Indianapolis, Indiana.

A further unwarranted hardship, as applying to these particular movements, would be one of working against the intermingling of freight as tendered to your plaintiff by all classes of the shipping and receiving public and would not only hamper the free flow of commerce but would delay the transportation of vital war materials which are being today transported by your plaintiff, and, further, would bring about increased costs of operation affecting the entire operation as a whole. The business as aforesaid mentioned is entirely placed in jeopardy for the authorized routes as covered by certificates of public convenience and necessity between Indianapolis, Indiana and St. Louis, Mo., and between Louisville, Kentucky and Chicago, Illinois, giving consideration to Indianapolis, Indiana, are in variance with the degree of circuitry as permitted by the rules of the Office of Defense transportation.

18 Wherefore, plaintiff prays:

1. That process issue against the defendant, United States, and the defendant, Interstate Commerce Commission, as provided by law.

2. That the Court, as soon as practicable after the filing of this complaint, shall call to its assistance in hearing and determination thereof, two other Judges, one of whom shall be a Circuit Judge.

3. That a temporary restraining order be granted and issued herein, without notice, to be effective until the further order of the Court, and until such time as notice can be given, and proper hearing can be had thereon, of an application to be made for a preliminary injunction, such restraining order to in all respects restrain the defendants herein, and their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice thereof, from enforcing, or in any manner attempting to enforce, that part of said order in Cause No. MC-3339 aforesaid, as limits and restricts the operations of this plaintiff as a common carrier of general commodities to those commodities which are at the time moving on bills of lading of freight forwarders.

4. That after such notice as the Court may require, and upon such hearing as may be necessary, a preliminary or temporary

injunction be granted and issued, to be effective until the final adjudication herein, enjoining and prohibiting the defendants herein, and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice thereof, from enforcing, or in any manner attempting to enforce, that part of said order in Cause No. MC-3339 aforesaid, as limits and restricts the operations of this plaintiff as a common carrier of general commodities to those commodities which are at the time moving on bills of lading of freight forwarders.

19 5. That upon the final hearing herein, it be adjudged and decreed that that part of the order of the defendant Commission in said cause No. MC-3339 complained of herein, and which attempts to limit and restrict the operations of this plaintiff as a common carrier of general commodities to such general commodities which are at the time moving on bills of lading of freight forwarders, be declared null, void and of no force or effect, and that the defendants, and each and all of their officers, agents, servants, employees, and attorneys, and all persons whomsoever shall be permanently enjoined and prohibited from enforcing said part of said order.

6. That this Honorable Court grant the plaintiff such other and further relief as may be just and proper in the premises.

HANCOCK TRUCK LINES, INC.,  
By ROY A. FRIEDLE,  
Roy A. Friedle, *President.*

[*Duly sworn to by Roy A. Friedle; jurat omitted in printing.*]

20

JACOB WEISS,  
Jacob Weiss,  
512 Insurance Building,  
Indianapolis, Indiana,  
Lincoln 6569,  
ALBERT WARD  
Albert Ward,  
318 Insurance Building,  
Indianapolis, Indiana, Market 0402,  
FERDINAND BORN,  
Ferdinand Born,  
718 Chamber of Commerce Bldg.,  
Indianapolis, Indiana, Lincoln 3868,  
*Attorneys for Plaintiff.*



INTERSTATE COMMERCE COMMISSION

No. MC-3339<sup>1</sup>

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

Submitted April 3, 1941. Decided October 7, 1942

1. Applicant found entitled to continue operations as a common carrier by motor vehicle, of general commodities, between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, and Pennsylvania, over regular routes, by reason of having been so engaged on June 1, 1935, and continuously since. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application No. MC-3339 in all other respects denied.

2. Applicant found to have failed to establish the right to a permit as a contract carrier by motor vehicle under the "grandfather" clause of section 209 (a) of the act. Application No. MC-3340 denied.

Ferdinand Born and Jacob Weiss for applicant.

Jerome D. Fenton, Paul Hergenreder, Vernon L. Stouffer, Harry E. Yockey, Joseph H. Welker, Paul M. Burke, Howell Ellis, B. W. La Tourette, Oscar Lindstrand, Jacob B. Josselson, Jack Goodman, O. G. Tiedeman, and Thomas B. Harvey for protestants.

REPORT OF THE COMMISSION

DIVISION 5. COMMISSIONERS LEE, ROGERS, AND PATTERSON

BY DIVISION 5:

Exceptions were filed by applicant and by protestants to the recommended order of the examiner, and each replied to the exceptions of the other. Our conclusions differ somewhat from those recommended.

By application No. MC-3339, under the "grandfather" clause of section 206 (a) of the Interstate Commerce Act, filed February 4, 1936, as amended, Globe Cartage Company, Inc., of Indianapolis, Ind., seeks a certificate authorizing continuance of operations as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, except commodities in bulk and those of unusual length, height, or weight, between

<sup>1</sup> This report also embraces No. MC-3340, Globe Cartage Company, Inc., Contract Carrier Application.

certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, and West Virginia, over the regular routes described in appendix A hereto, serving all intermediate points. Appendix A is a copy of an exhibit which was submitted in evidence at the hearing, and is reproduced here as a basis for discussion. The "exhibit numbers" appearing thereon before each route description correspond to the exhibit numbers under which documentary evidence of operation between designated points is listed.

By another application, No. MC-3340, under the "grandfather" clause of section 209 (a) of the Interstate Commerce Act, filed February 4, 1936, as amended, the same applicant seeks a permit authorizing continuance of operations as a contract carrier by motor vehicle, in interstate or foreign commerce, of the same commodities, between the same points, and over the same regular routes as claimed in No. MC-3339. There was no evidence offered in support of No. MC-3339, but a motion to consolidate the records in the two proceedings was granted by the examiner. A number of rail and motor carriers oppose both applications.

Applicant was incorporated under the laws of Indiana, in 1931. It has been engaged in the transportation of freight for the Universal Carloading & Distributing Company, hereinafter called Universal, under written contracts since prior to June 1, 1935. In addition to serving Universal it also claims to have been operating for other shippers, under contract, transporting such commodities as magazines (packed in mail bags), leather, printed matter, paper, bottles, and alcoholic beverages. The names of the persons for whom such operations are claimed to have been performed were not disclosed, and no showing was made as to the extent of such service, the time when it was begun, the points served, the frequency of the service, or the arrangements under which the operations were conducted. In addition, we observe that, out of several thousand trips shown of record both prior and subsequent to June 1, 1935, not one relates to service other than that performed for Universal. The burden of proof in support of a claim of an operating right under the "grandfather" clauses of sections 206 (a) and 209 (a) of the act rests upon applicant both as to the character and scope of its operations, both on and since the respective statutory dates. On the present record, we must conclude that applicant has failed to establish that it has served any shippers other than Universal.

As above stated, applicant claims to have transported magazines in mail bags, but the record does not indicate whether it has been engaged in the transportation of mail when so-employed. If so, attention is invited to the fact that authority from the Commission

is not necessary for the transportation of mail under contract with the Post Office Department or as a subcontractor with the approval of that Department, in vehicles used exclusively for that purpose, or in the same vehicle with property moving in interstate or foreign commerce. Freer Bros. Motor Exp. Lines Common Carrier Application, 7 M. C. C. 203.

The business of Universal, a forwarder or carloading company, is the receipt of individual shipments of miscellaneous articles from the general public and the consolidation thereof into carload or truckload quantities, for transportation by rail, water, or motor, between numerous points throughout the United States. Applicant has no dealings with the individual shippers, but transports consolidated lots of freight under a written contract with Universal. The vehicles are loaded and sealed at Universal's loading platforms by its employees and also unloaded at destination by that company's employees. When a vehicle contains freight destined to two or more terminals of Universal, it is partially unloaded and again sealed and dispatched to the next terminal for further partial unloading or complete unloading as the case may be. Applicant's service has been confined to transporting between the larger cities where Universal has dock or terminal space. At such points, local carriers perform collection and delivery services. Universal solicits from the public all the freight transported by applicant and issues bills of lading designating itself as both the consignor and consignee, and in the space provided for naming the route or carrier, applicant's name is inserted.

Tariffs, schedules of minimum rates, and copies of contracts with Universal have been filed by applicant with this Commission. Shipments for Universal are not confined to any particular weight, but applicant accepts any quantity, and transportation charges are collected on the basis provided in its schedule of minimum rates and charges.

Applicant contends that its service for Universal is that of a contract carrier by motor vehicle. In Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211, the Commission pointed out that forwarding companies are engaged in common carriage for the general public, and expressed the view that shipments for which they assume responsibility cannot lose their identity as shipments in common carriage at any stage of the transportation service which the forwarding company undertakes to provide, and that they are not, therefore, shipments which can be transported lawfully by a motor contract carrier. Applicant's services for Universal are those of a common carrier. American Motor Dispatch, Inc., Com. Car. Application, 26 M. C. C. 346,

and Hoey Cartage Co. Contract Carrier Application, 28 M. C. C. 102. Since applicant's entire operations so far as shown by this record have been for Universal and have been and are those of a common carrier, the application for a permit will be denied.

Applicant was registered under the code of fair competition for the trucking industry during the years 1934 and 1935. As of June 1, 1935, it operated 172 units, consisting of 85 tractors, 84 semi-trailers, and 3 straight trucks, of which 12 tractors, 18 semi-trailers, and 2 trucks were owned by it. At the time of the hearing, approximately 202 units, consisting of 102 tractors, 92 semi-trailers, and 8 "spotting" tractors, were used by applicant, of which 23 tractors and 45 semitrailers were owned by it. Equipment not owned by applicant has been operated under arrangements with owner-operators.

There is no showing that applicant has operated its owned equipment indiscriminately over all of the routes claimed sufficiently to establish "grandfather" rights thereover, and we must therefore determine whether the operations performed by the use of owner-operators have been, and are, those of applicant. There are no contracts or other documentary evidence of record bearing on this matter, and the evidence as to the exact terms or the arrangements between applicant and the owner-operators is not as complete as it might be. It does appear, however, that it has been customary for applicant to have written leases with its owner-operators since prior to June 1, 1935. The term of these leases was 1 year. The owner-operators worked exclusively for applicant and paid the cost of operation of their vehicles. They had no contact with Universal, and all billing was in applicant's name. Applicant collected the charges for all services rendered. It provided cargo, and public-liability, and property-damage insurance on the vehicles of the owner-operators and assumed responsibility for loss and damages resulting from the latter's operations. Applicant had the right to hire and discharge the drivers used on owner-operator equipment, and its dispatchers and other employees directed the time and manner of loading of the owner-operator equipment and its movements over the routes in question. Many of the owner-operators utilized have worked for applicant for a number of years. Applicant holds authority to operate as a motor carrier of property in the several States through which operations are conducted. It is responsible only to Universal and holds itself out to Universal as the carrier.

In *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735, division 5 held that operations by owner-operators, when definitely under an applicant's direction, control, and responsibility, become the operations of such applicant, which is



the dominant carrier. Based on the facts above stated, we conclude that the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control and under its responsibility, and that the operations so conducted were those of applicant.

Applicant claims to have operated over all the routes described in appendix A, serving all intermediate points. Numerous abstracts of shipping documents purporting to show operation since the statutory date were offered in evidence, but they fail to show continuous operation between all points claimed. The general traffic manager of applicant, who has been with the company since 1932, testified that applicant's operations have been conducted between the points and over all the routes described in appendix A continuously since prior to June 1, 1935. His testimony, however, was indefinite, and cannot be identified with any particular point or route. It does not disclose the date operations were instituted over any particular route, or other data necessary to establish with particularity the fact of continuous operation on and since the statutory date. Standing alone, it is insufficient in our opinion to prove all the operations of the scope here claimed in the absence of supporting documentary evidence.

In January 1937, the White River at Indianapolis reached flood stage and caused water from the sewers to back up into applicant's office and record room, causing considerable damage to its records. In cleaning up after the flood, two truckloads of records were hauled away because of the infiltration of filth, water, grease, and oil. Furthermore, the records that were made available to one of our field staff in applicant's office, in October 1936, could not be located for presentation at the hearing. The operations which the damaged records would have covered if they had been available has not been established. Applicant also failed to present documentary evidence showing operations subsequent to January 1937, the flood period, between certain points hereinafter discussed in detail.

The points served and routes traversed will be discussed in the order in which the evidence was submitted, as shown in Appendix A. The examiner recommended that applicant be authorized to operate over 37 regular routes including several alternate routes. Those hereinafter granted are described and numbered in appendix B hereto.

Now uncontested routes.—In exceptions filed by protestants to the order recommended by the examiner, no mention is made of the first 11 routes proposed to be granted by the examiner, which routes coincide with the first 11 exhibit listings described in appendix A. These routes, which reflect operations (1) between Chi-



ago, Ill., and St. Louis, Mo., (2) between St. Louis and Cincinnati, Ohio, (3) between Louisville, Ky., and Cincinnati, (4) between Indianapolis, Ind., and Cincinnati, (5) between Indianapolis and Cleveland, Ohio, (6) between St. Louis and Dayton, Ohio, (7) between Louisville and Indianapolis, (8) between St. Louis and Louisville, (9) between St. Louis and Cleveland, (10) between St. Louis and Pittsburgh, Pa., and (11) between Indianapolis and St. Louis, need not be discussed in detail. Authority will be granted to continue such operations over any combination of the routes described in appendix B hereto.

**Intermediate points.**—The application includes a request to serve all intermediate points on the described routes, but the only evidence of service at such points relates to East St. Louis, Middletown, and Hamilton, Ohio. There is no documentary evidence to show operation at East St. Louis, but the general traffic manager of Universal was positive in his assertion that an increase in business at the St. Louis office caused his firm to open an office in East St. Louis in September 1934, from which date service at East St. Louis was given by applicant. The lack of documentary proof of service is explained by the fact that shipments from or to such point were billed as to or from St. Louis. The actual operating practice, however, was to stop in-bound trucks for partial unloading at East St. Louis. Out-bound trucks from St. Louis were partially loaded at East St. Louis in a similar manner, which practice has been continued to date. That service has been rendered Universal to and from the intermediate points of Middletown and Hamilton, Ohio, continuously since June 8, 1934, is satisfactorily shown by parol evidence of the terminal manager at Cincinnati, who has held that position since the latter date. Except as to these points, the authority herein granted will not include any intermediate point off any of the described routes. Routes between remaining points will be separately discussed.

**Akron-St. Louis.**—The documentary evidence submitted discloses one shipment on May 28, 1935, from St. Louis to Akron, none from that date to May 18, 1936, and from the later date to December 31, 1938, there were numerous shipments. No shipments are shown from December 31, 1938, to the date of the hearing in November 1939. It is apparent that, if a service from St. Louis to Akron can be said to have existed on the statutory date, it was abandoned on December 31, 1938. With respect to service in the opposite direction, the documentary evidence shows that applicant has operated from Akron to St. Louis continuously since a date prior to June 1, 1935, and is entitled to continue that service.

**Akron-Cleveland.**—On the claimed operation from Akron to Cleveland, there was shown only one shipment, which moved

January 24, 1937. In the reverse direction, numerous shipments were made from March 8, 1934, to April 4, 1935, but the record does not show that there were any shipments after the latter date except for two in 1939, one on January 12 and the other on June 12. The evidence is not sufficient to justify the granting of authority sought between Akron and Cleveland.

Akron-Chicago.—There were shown four shipments only, from Chicago to Akron; three of those in November 1936 and the other September 3, 1938. The first shipment shown from Akron to Chicago was on April 8, 1936, with six others during 1936, five during 1937, numerous others during 1938, and eight during the first half of 1939. The evidence of operation between Chicago and Akron showing no service at all prior to June 1, 1935, is not sufficient to prove "grandfather" rights between those points over the routes claimed.

Akron-Buffalo.—As to the claimed operation from Akron to Buffalo, N. Y., there were shown three shipments in 1938; two shipments in 1939; and, in the reverse direction, two only, in 1938, one on February 24 and the other on March 3. This showing is not sufficient to prove a "grandfather" operation between these points.

St. Louis-Springfield.—There is no documentary evidence indicating any operation from St. Louis to Springfield, Ohio. The operation in the reverse direction from Springfield to St. Louis was instituted prior to June 1, 1935, and continued rather consistently until July 31, 1936. From the latter date to September 27, 1937, no service is shown. After September 27, there were 9 shipments in 1937; 20 in 1938; and 3 in 1939, 1 on January 3, 1 on February 25, and the other on March 1. Most of the period in 1937 as to which there is no documentary evidence was after the flood that destroyed a portion of applicant's records. No explanation was made of the failure to show any shipments moved after March 1, 1939. Applicant has failed to establish an operation between St. Louis and Springfield over the routes claimed.

Dayton-Indianapolis.—No documentary evidence was submitted to show an operation from Dayton to Indianapolis. In the opposite direction, there were shown two shipments in 1935, none in 1936, a substantial number in 1937, two in December 1938, and one on February 6, 1939. This showing suggests a virtual cessation of operation over this route and is not sufficient to establish the routes claimed between Indianapolis and Dayton.

Indianapolis-Toledo.—The service between Indianapolis and Toledo, was instituted prior to June 1, 1935, but no service from Toledo to Indianapolis is shown after September 27, 1937, and none in the opposite direction after October 1, 1937. Applicant has failed to establish the rights sought between these points.

**St. Louis-Toledo.**—The operation between St. Louis and Toledo was begun prior to the statutory date, but no service is shown from St. Louis to Toledo from September 11, 1935, to August 14, 1937, none in 1938, and only one shipment in 1939. No service was rendered from Toledo to St. Louis during 1937. There were two shipments in 1938, and two in 1939. No operating rights have been established between these points over the routes claimed.

**Indianapolis-Detroit.**—The record shows three shipments in May 1934, one in August, one in September, and one on November 15, 1934, but there is no documentary evidence of operation from Detroit to Indianapolis from November 15, 1934, to May 16, 1936. Quite a volume of shipments continuously since the latter date are shown. It thus appears that there was no operation on the statutory date. Even if consideration be given to the operation prior to November 1934, the cessation in such service for approximately 19 months must be considered an abandonment thereof.

With respect to service in the opposite direction, there were nine shipments during 1935, some of them prior to June 1, and considerably more during each of the subsequent years. The evidence submitted is deemed sufficient proof that applicant has operated from Indianapolis to Detroit since prior to June 1, 1935.

**Indianapolis-Pittsburgh.**—Operation from Pittsburgh, Pa., to Indianapolis was instituted on May 3, 1935, and there was a regular movement until June 17, 1938, at which time the service in that direction appears to have been abandoned, as there is no evidence of operation since that time. However, the evidence presents a different picture with respect to service from Indianapolis to Pittsburgh. It was begun in May 1935 and has been continuous since.

**Louisville-Cleveland.**—The record shows numerous shipments from Louisville to Cleveland from May 1, 1935, to December 31, 1936, two in January, one in February, one on April 8, 1937, and none from the latter date to February 10, 1939, a cessation of operation for 22 months. Numerous shipments were made from Cleveland to Louisville from May 1, 1935, to November 20, 1937, but the record does not show any shipments after the latter date except one on August 14, 1939. No rights between these points can properly be granted on the present record.

**Louisville-Pittsburgh.**—The documentary evidence submitted, which need not be reviewed, shows that applicant is entitled to continue the operations between Louisville and Pittsburgh.

**Pittsburgh-Cincinnati.**—The operation between Pittsburgh and Cincinnati was instituted on July 14, 1936, in one direction, and in the opposite direction on July 15, 1936, or more than 13 months

after the statutory date. The evidence will not support a finding that applicant is entitled to authority to operate between Pittsburgh and Cincinnati.

Louisville-Chicago, Indianapolis-Chicago, Cincinnati-Chicago.—No exceptions were filed to that portion of the examiner's recommended order which proposed a grant of operating authority between these points. They need not be discussed in detail. Authority will be granted between these points.

Chicago-Pittsburgh.—According to the documentary evidence submitted in support of the operation from Pittsburgh to Chicago, the service commenced prior to June 1, 1935, was abandoned from April 18, 1936, to September 2, 1937, both inclusive. Service in the opposite direction has been continuous since prior to the statutory date. Applicant is entitled to continue operation from Chicago to Pittsburgh.

Detroit-Louisville.—There is also ample proof which need not be described in detail that applicant is entitled to continue operating between Detroit and Louisville.

Dayton-Springfield.—The evidence shows conclusively that on April 29, 1938, applicant abandoned an operation begun prior to June 1, 1935, from Dayton to Springfield. Service in the reverse direction was discontinued on April 1, 1938. Applicant has failed to establish a right to operate between these points.

Columbus-Pittsburgh.—There is no documentary evidence of operation from Columbus to Pittsburgh. In the reverse direction, there were seven shipments in 1935, three shipments in 1936, three shipments in 1937, none in 1938, and only one in 1939. Having in mind the importance of these points, the meager service shown is not sufficient to warrant a finding of a bona fide operation on and continuously since June 1, 1935.

Cleveland-Pittsburgh.—No documentary proof was offered with respect to service from Pittsburgh to Cleveland. There is satisfactory proof, however, with respect to the operation from Cleveland to Pittsburgh.

Columbus-St. Louis.—Evidence of operation from Columbus to St. Louis shows 1 shipment on March 2, 1935, none in 1936, 9 in 1937, and 17 in 1938, but no evidence was submitted to show an operation after December 16, 1938. The record does not show any evidence of operation from St. Louis to Columbus. On the present record, no authority can properly be granted between these points.

Cleveland-Cincinnati.—The evidence shows 2 shipments in 1934 from Cleveland to Cincinnati, 3 in October and November 1935, 10 in 1936, 2 in 1937, 5 in 1938, and 1 on January 28, 1939. No



evidence was submitted to show an operation in the reverse direction. Applicant therefore has not submitted sufficient proof to show continuous operation between these points over the routes claimed.

**Buffalo-Pittsburgh.**—Applicant did not submit any documentary evidence in support of a claimed route between Buffalo and Pittsburgh, and it does not appear to be entitled to authority to operate between these points over the route described in appendix A.

**Buffalo-St. Louis.**—The first operation between Buffalo and St. Louis shown by any documentary evidence was on June 27, 1936, and there has been a continuous operation since that time. However, the general traffic manager of Universal, who has been with the company since December 1, 1918, was positive that service has been rendered by applicant between Buffalo and St. Louis since September 1934, at which time Universal opened its office in East St. Louis. Daily service is provided between these points. The operation will be authorized between these points.

**Buffalo-Chicago.**—No documentary evidence was submitted in support of a claimed operation over specified routes between Buffalo and Chicago. Consequently, no authority can be granted between these points.

**Buffalo-Indianapolis.**—Both parol and documentary evidence show that the operation between Buffalo and Indianapolis also was commenced in September 1934. No interruption appears, and the operation will be authorized.

**Louisville-Buffalo.**—There was no documentary evidence nor definite and specific oral testimony to support the claimed operation between Louisville and Buffalo. No authority can be granted to operate between these points.

On and continuously since June 1, 1935, applicant has transported shipments for Universal, consisting of general freight, over the routes and in the manner described in appendix B. With this fact in mind, protestants contend that any authority granted herein should be limited to common-carrier service for Universal for the reason that the evidence presented as proof of operation was confined to traffic handled by that company. Careful consideration convinces us that this contention should not be sustained. Section 203. (a) (44) of the act provides that the term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for compensation. We cannot, consistently with applicant's common-carrier status, restrict its service to particular shippers, namely, freight forwarders. And to restrict the traffic which it may transport to



shipments made by freight forwarders would, in effect and result, be a restriction of applicant's service to such forwarders.

We find that on June 1, 1935, applicant was, and continuously since has been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, (1) between Chicago, Ill., and St. Louis, Mo., (2) between St. Louis and Cincinnati, Ohio, (3) between Louisville, Ky., and Cincinnati, (4) between Indianapolis, Ind., and Cincinnati, (5) between Indianapolis and Cleveland, Ohio, (6) between St. Louis and Dayton, Ohio, (7) between Louisville and Indianapolis, (8) between St. Louis and Louisville, (9) between St. Louis and Cleveland, (10) between St. Louis and Pittsburgh, Pa., (11) between Indianapolis and St. Louis, (12) from Akron, Ohio, to St. Louis, (13) from Indianapolis to Detroit, Mich., (14) from Indianapolis to Pittsburgh, (15) between Louisville and Pittsburgh, (16) between Louisville and Chicago, Ill., (17) between Indianapolis and Chicago, (18) between Cincinnati and Chicago, (19) from Chicago to Pittsburgh, (20) between Detroit and Louisville, (21) from Cleveland to Pittsburgh, (22) between Buffalo, N. Y., and St. Louis, and (23) between Buffalo and Indianapolis, over the routes described in appendix B hereto, serving East St. Louis, Ill., and Middletown and Hamilton, Ohio, as intermediate points, that, by reason of such operation, it is entitled to a certificate authorizing the continuance thereof; and that in all other respects the application should be denied.

We find, in No. MC-3340, that applicant has failed to establish the right to a permit under the "grandfather" clause of section 209 (a) of the act and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying No. MC-3339, except to the extent granted herein, and denying No. MC-3340 in its entirety.

ROGERS, Commissioner, concurring:

I approve the report. However, I believe that there is merit in the contention, discussed in the report, that any authority granted to applicant should be restricted to the type of traffic which applicant has exclusively transported since prior to the statutory date. This could be accomplished by a restriction of the authority to " \* \* \* traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders, as defined in section 402 (a) (5) of part IV of the Interstate Commerce Act." Freight forwarders do not occupy the mere status of a shipper.

PATTERSON, Commissioner, dissenting:

Section 203(14) of the act defines a common carrier by motor vehicle as any person which "holds itself out to the general public" to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation.

The holding out may be limited as to the articles transported and the points between which transportation will be performed. It may not be limited to particular shippers or classes of shippers but must be to the general public.

This applicant since prior to June 1, 1935, has served only the Universal Carloading & Distributing Company under written contracts and has never held itself out to serve the general public. In my opinion, it is and has been exclusively a contract carrier.

#### APPENDIX A

##### *Routes claimed*

##### EXHIBIT 1

Between Chicago, Ill., and St. Louis, Mo.

Regular route:

From St. Louis, Mo., to intersection of Ill. S. R. 48 via U. S. 66

From intersection of Ill. S. R. 48 and U. S. 66 to Onarga, Ill., via Ill. S. R. 48

From Onarga, Ill., to intersection of U. S. 66 via U. S. 45

From intersection of U. S. 66 and U. S. 45 to Chicago, Ill., via U. S. 66

Alternate route:

A. From St. Louis, Mo., to Springfield, Ill., via U. S. 66

From Springfield, Ill., to Peoria, Ill., via Ill. S. R. 24

From Peoria, Ill., to Chenoa, Ill., via U. S. 24

From Chenoa, Ill., to Chicago, Ill., via U. S. 66

B. From St. Louis, Mo., to Chicago, Ill., via U. S. 66

##### EXHIBIT 2

Between St. Louis, Mo., and Cincinnati, Ohio

Regular route:

From St. Louis, Mo., to Cleves, Ohio, via U. S. 50

From Cleves, Ohio, to Cincinnati, Ohio, via Ohio S. R. 264

Alternate route:

From St. Louis, Mo., to Indianapolis, Ind., via U. S. 40

From Indianapolis, Ind., to Cincinnati, Ohio, via U. S. 52

EXHIBIT 3

Between Louisville, Ky., and Cincinnati, Ohio

Regular route:

From Louisville, Ky., to Seymour, Ind., via U. S. 31, 31E and 31W

From Seymour, Ind., to Cleves, Ohio, via U. S. 50

From Cleves to Cincinnati, Ohio, via Ohio S. R. 264

Alternate route:

From Louisville, Ky., to Covington, Ky., to Cincinnati, Ohio, via U. S. 42

EXHIBIT 4

Between Indianapolis, Ind., and Cincinnati, Ohio

Regular route:

From Indianapolis, Ind., to Cincinnati, Ohio, via U. S. 52

Alternate route:

From Indianapolis, Ind., to intersection of U. S. 35 via U. S. 40

From intersection of U. S. 40 and U. S. 35 to Eaton, Ohio, via U. S. 35

From Eaton, Ohio, to intersection of Ohio S. R. 122 and Ohio S. R. 4 via Ohio S. R. 122

From intersection of S. R. 4 and S. R. 122 to Cincinnati, Ohio, via S. R. 4

EXHIBIT 5

Between Indianapolis, Ind., and Cleveland, Ohio

Regular route:

From Indianapolis, Ind., to the intersection with Ohio S. R. 32 via 67

From Intersection of Ohio S. R. 32 and 67 to Wapakoneta, Ohio, via U. S. 32 (33)

From Wapakoneta, Ohio, to Findlay, Ohio, via U. S. 25

From Findlay, Ohio, to Lodi, Ohio, via U. S. 224

From Lodi, Ohio, to Cleveland, Ohio, via U. S. 42

Alternate route:

A. From Indianapolis, Ind., to Lafayette, Ohio, via U. S. 40

From Lafayette, Ohio, to Cleveland, Ohio, via U. S. 42

B. From Indianapolis, Ind., to the intersection U. S. 127 via U. S. 40

From intersection of U. S. 127 and U. S. 40 to Celina, Ohio, via U. S. 127

From Celina, Ohio, to Wapakoneta, Ohio, via Ohio S. R. 32 (33)

From Wapakoneta, Ohio, to Findlay, Ohio, via U. S. 25

From Findlay, Ohio, to junction with Ohio S. R. 3 via U. S. 224

From junction Ohio S. R. 3 and U. S. 224 to Cleveland, Ohio, via S. R. 3

EXHIBIT 6

Between St. Louis, Mo., and Dayton, Ohio

Regular route:

From Indianapolis, Ind., to the intersection of U. S. 35 and U. S. 40 via U. S. 40

From the intersection of U. S. 35 and U. S. 40 to Dayton, Ohio, via U. S. 35

Alternate route:

From St. Louis, Mo., to Miami, Ohio, via U. S. 50

From Miami, Ohio, to Hamilton, Ohio, via Ohio S. R. 128

From Hamilton, Ohio, to Dayton, Ohio, via Ohio S. R. 4

EXHIBIT 7

Between Louisville, Ky., and Indianapolis, Ind.

Regular route:

From Louisville, Ky., to Indianapolis, Ind., via U. S. 31, 31E and 31W

Alternate route:

From Louisville, Ky., to the intersection of Indiana S. R. 9 and U. S. 31, 31E and 31W

From intersection of Indiana S. R. 9 and U. S. 31 to the intersection of Indiana S. R. 7 and 9 via S. R. 9

From intersection of Indiana S. R. 7 and S. R. 9 to Columbus, Ind., via Indiana S. R. 7

From Columbus, Ind., to Indianapolis, Ind., via U. S. 31

EXHIBIT 8

Between St. Louis, Mo., and Louisville, Ky.

Also deadhead to Alton, Ill., from St. Louis, Mo., and from Alton, Ill., to St. Louis, Mo.

Regular route:

From St. Louis, Mo., to Shoals, Ind., via U. S. 50

From Shoals, Ind., to Louisville, Ky., via U. S. 150

Alternate route:

Between St. Louis, Mo., and Alton, Ill., via Illinois U. S. 67

From Alton, Ill., to intersection of Illinois 140 and U. S. 40 to intersection of Illinois S. R. 127 via Illinois S. R. 140 and U. S. 40

From intersection of Illinois S. R. 127 and U. S. 40 to junction with Illinois S. R. 127 and U. S. 50 via U. S. 127

From intersection of U. S. 50 and Illinois S. R. 127 to Shoals, Ind., via U. S. 50

From Shoals, Ind., to Louisville, Ky., via U. S. 150

EXHIBIT 9

Between St. Louis, Mo., and Cleveland, Ohio

Regular route:

From St. Louis, Mo., to Springfield, Ill., via U. S. 66

From Springfield, Ill., to Indianapolis, Ind., via U. S. 36

From Indianapolis, Ind., to junction with Ohio S. R. 32 (33) via Ind. S. R. 67

From intersection of Ohio S. R. 32 (33) and Ind. S. R. 67 to Wapakoneta via Ohio S. R. 32 (33)

From Wapakoneta to Findlay, Ohio, via U. S. 25

From Findlay, Ohio, to Lodi, Ohio, via U. S. 224

From Lodi, Ohio, to Cleveland, Ohio, via U. S. 42 with alternate from Lodi, Ohio, to intersection with Ohio S. R. 3 via U. S. 224

From intersection of Ohio S. R. 3 and U. S. 224 to Cleveland, Ohio, via Ohio S. R. 3

Alternate route:

From St. Louis, Mo., to intersection with Ill. S. R. 16 via U. S. 66

From intersection of Ill. S. R. 16 and U. S. 66 to Mattoon, Ill., via S. R. 16

From Mattoon, Ill., to Tuscola, Ill., via U. S. 45

From Tuscola, Ill., to Indianapolis, Ind., via U. S. 36

From Indianapolis, Ind., to intersection with Ohio S. R. 3 via U. S. 40

From intersection of Ohio S. R. 3 and U. S. 40 to Cleveland, Ohio, via S. R. 3

EXHIBIT 10

Between St. Louis, Mo., and Pittsburgh, Pa.

Regular route:

From St. Louis, Mo., to Cambridge, Ohio, via U. S. 40

From Cambridge, Ohio, to Pittsburgh, Pa., via U. S. 22

Alternate route:

A. From St. Louis, Mo., to intersection with Ohio S. R. 79 via U. S. 40



- From intersection with Ohio S. R. 79 and U. S. 40 via Ohio S. R. 79 to Newark, Ohio
- From Newark, Ohio, to Uhrichsville, Ohio, via Ohio S. R. 16
- From Uhrichsville, Ohio, to Cadiz, Ohio, via U. S. 36 and U. S. 250
- From Cadiz, Ohio, to Pittsburgh, Pa., via U. S. 22
- B. From St. Louis, Mo., to Indianapolis, Ind., via U. S. 40
- From Indianapolis, Ind., to intersection with Ohio S. R. 32 (33) via Ind. S. R. 67
- From intersection of Ohio S. R. 32 (33) and Ind. S. R. 67 to Wapakoneta, Ohio, via Ohio S. R. 32 (33)
- From Wapakoneta, Ohio, to Findlay, Ohio, via U. S. 25
- From Findlay, Ohio, to intersection with Ohio S. R. 14 via U. S. 224
- From intersection of Ohio S. R. 14 and U. S. 224 to intersection of Ohio S. R. 14 and Pa. S. R. 51 via Ohio S. R. 14
- From intersection of Pa. S. R. 51 and Ohio S. R. 14 to Pittsburgh, Pa., via Pa. S. R. 51

EXHIBIT 11

Between Indianapolis, Ind., and St. Louis, Mo.

Regular route:

From Indianapolis, Ind., to St. Louis, Mo., via U. S. 40

Alternate route:

From Indianapolis, Ind., to Springfield, Ill., via U. S. 36

From Springfield, Ill., to St. Louis, Mo., via U. S. 66

EXHIBIT 12

Akron, Ohio, to St. Louis, Mo.

Cleveland, Ohio, to Akron, Ohio

Akron, Ohio, to Chicago, Ill.

Akron, Ohio, to Buffalo, N. Y.

Between Akron, Ohio, and St. Louis, Mo.

Regular route:

From Akron, Ohio, to Findlay, Ohio, via U. S. 224

From Findlay, Ohio, to Wapakoneta, Ohio, via U. S. 25

From Wapakoneta, Ohio, to junction with Ind. S. R. 67 via Ohio S. R. 32 (33)

From intersection of Ind. S. R. 67 and Ohio S. R. 32 (33) to Indianapolis, Ind., via Ind. S. R. 67

From Indianapolis, Ind., to St. Louis, Mo., via U. S. 40

Alternate route:

- A. From Akron, Ohio, to Huntington, Ind., via U. S. 224
- From Huntington, Ind., to intersection with U. S. 36 via Ind. S. R. 9
- From intersection of U. S. 36 and Ind. S. R. 9 to Springfield, Ill., via U. S. 36
- From Springfield, Ill., to intersection of U. S. 66 and Ill. S. R. 140 via U. S. 66
- From intersection of Ill. S. R. 140 and U. S. 66 to intersection with U. S. 67 via Ill. S. R. 140
- From intersection of U. S. 67 and S. R. 140 to St. Louis, Mo., via U. S. 67
- B. From Akron, Ohio, to Huntington, Ind., via U. S. 224
- From Huntington, Ind., to intersection of U. S. 24 with Ill. S. R. 24 via U. S. 24
- From intersection of Ill. S. R. 24 and U. S. 24 to intersection with U. S. 66 via Ill. S. R. 24
- From intersection of U. S. 66 and Ill. S. R. 24 to St. Louis, Mo., via U. S. 66

Between Cleveland, Ohio, and Akron, Ohio

- From Cleveland, Ohio, to intersection of Ohio S. R. 14 and Ohio S. R. 8 via Ohio S. R. 14
- From intersection of Ohio S. R. 8 and Ohio S. R. 14 to Akron, Ohio, via S. R. 8

Between Akron, Ohio, and Chicago, Ill.

- From Akron, Ohio, to intersection of S. R. 8 and S. R. 14 via Ohio S. R. 8
- From intersection of Ohio S. R. 14 and Ohio S. R. 8 to intersection with Ohio S. R. 2 via S. R. 14
- From intersection of S. R. 2 and S. R. 14 via S. R. 2 to intersection of S. R. 2 and S. R. 263 via S. R. 2
- From intersection of S. R. 263 and S. R. 2 to intersection with U. S. 20 via S. R. 263
- From intersection of U. S. 20 and S. R. 263 to Angola, Ind., via U. S. 20
- From Angola, Ind., to Waterloo, Ind., via U. S. 27
- From Waterloo, Ind., to intersection with U. S. 6 and U. S. 41 via U. S. 6
- From intersection of U. S. 41 and U. S. 6 to Chicago, Ill.; via U. S. 41

Alternate route:

- From Akron, Ohio, to Findlay, Ohio, via U. S. 224
- From Findlay, Ohio, to intersection with U. S. 30 and 30 N via U. S. 25

Alternate (From Akron, Ohio, to Van Wert, Ohio, via U. S. 224)

From intersection of U. S. 30 N & S to intersection with U. S. 41 via U. S. 30 N & S

From intersection of U. S. 41 and U. S. 30 to Chicago, Ill., via U. S. 41

Between Akron, Ohio, and Buffalo, N. Y.

Regular route:

From Akron, Ohio, to intersection of Ohio S. R. 91 via S. R. 5

From intersection of S. R. 91 and S. R. 5 to intersection with S. R. 84 via S. R. 91

From intersection of S. R. 84 and S. R. 91 to intersection with U. S. 20 via S. R. 84

Alternate (from intersection of S. R. 91 and S. R. 84 via U. S. 20 to intersection with N. Y. 50)

From intersection of U. S. 84 and U. S. 20 to intersection of N. Y. S. R. 5 via U. S. 20

From intersection New York S. R. 5 and U. S. 20 to Buffalo, N. Y., via N. Y. S. R. 5

#### EXHIBIT 13

Between Springfield, Ohio, and St. Louis, Mo.

Regular route:

From Springfield, Ohio, to St. Louis, Mo., via U. S. 40

Alternate route:

From Springfield, Ohio, to Dayton, Ohio, via Ohio S. R. 4

From Dayton, Ohio, to Cincinnati, Ohio, via Ohio S. R. 4

From Cincinnati, Ohio, to St. Louis, Mo., via U. S. 50

#### EXHIBIT 14

Between Indianapolis, Ind., and Dayton, Ohio

Regular route:

From Indianapolis, Ind., to intersection of U. S. 40 and U. S. 35 via U. S. 40

From intersection of U. S. 35 and U. S. 40 to Dayton, Ohio, via U. S. 35

Alternate route:

From Indianapolis, Ind., to intersection of U. S. 40 and U. S. 25 via U. S. 40

From intersection of U. S. 25 and U. S. 40 to Dayton, Ohio, via U. S. 25

#### EXHIBIT 15

Between Toledo, Ohio, and Indianapolis, Ind.

**Between Toledo, Ohio, and St. Louis, Mo.**

**Between Toledo, Ohio, and Indianapolis, Ind.**

**Regular route:**

From Toledo, Ohio, to Findlay, Ohio, via U. S. 25 and U. S. 68

From Findlay, Ohio, to Wapakoneta, Ohio, via U. S. 25

From Wapakoneta, Ohio, to intersection with Ohio S. R.

32 (33) and Indiana S. R. 67 via Ohio S. R. 32 (33)

From intersection of Indiana S. R. 67 and Ohio S. R.

32 (33) to Indianapolis, Ind., via Indiana S. R. 67

**Alternate route:**

From Toledo, Ohio, to Angola, Ind., via U. S. 20

From Angola, Ind., to Ft. Wayne, Ind., via U. S. 27

From Ft. Wayne, Ind., to Huntington, Ind., via U. S. 24

From Huntington, Ind., to intersection of S. R. 9 and

Indiana S. R. 67 via S. R. 9

From intersection of S. R. 67 and S. R. 9 to Indianapolis,

Ind., via Indiana S. R. 67

**Between Toledo, Ohio, and St. Louis, Mo.**

**Regular route:**

From Toledo, Ohio, to Findlay, Ohio, via U. S. 25 and U. S. 68

From Findlay, Ohio, to Wapakoneta, Ohio, via U. S. 25

From Wapakoneta, Ohio, to intersection, Ohio S. R. 32

(33) and Indiana S. R. 67 via Ohio S. R. 32 (33)

From intersection of Indiana S. R. 67 and Ohio S. R. 32

(33) to Indianapolis, Ind., via Indiana S. R. 67

From Indianapolis, Ind., to St. Louis, Mo., via U. S. 40

**Alternate route:**

From Toledo, Ohio, to intersection with U. S. 25 and

U. S. 40 via U. S. 25

From intersection of U. S. 40 and U. S. 25 to St. Louis,

Mo., via U. S. 40

**EXHIBIT 16**

**Between Indianapolis, Ind., and Detroit, Mich.**

**Regular route:**

From Indianapolis, Ind., to the intersection of Indiana S. R. 67 and Ohio S. R. 32 (33) via Indiana S. R. 67

From intersection of 32 (33) via Indiana S. R. 67 to Wapakoneta, Ohio, via Ohio 32 (33)

From Wapakoneta, Ohio, to Detroit, Mich., via U. S. 25

Alternate (Between Toledo and Detroit U. S. 24)

**Alternate route:**

From Indianapolis, Ind., to intersection of Indiana S. R. 67 and Ohio 32 (33) via Indiana S. R. 67

From intersection of Ohio S. R. 32 (33) to Celina, Ohio

From Celina, Ohio, to Van Wert, Ohio, via U. S. 127

From Van Wert to Findlay, Ohio, via U. S. 224

From Findlay to Detroit, Mich., via U. S. 25

Alternate (Between Toledo and Detroit U. S. 24)

EXHIBIT 17

Between Pittsburgh, Pa., and Indianapolis, Ind.

Regular route:

From Pittsburgh, Pa., to Cambridge, Ohio, via U. S. 22

From Cambridge, Ohio, to Indianapolis, Ind., via U. S. 40

Alternate route:

From Pittsburgh, Pa., to Mansfield, Ohio, via U. S. 30

From Mansfield, Ohio, to Van Wert, Ohio, via U. S. 30N

From Van Wert, Ohio, to intersection of U. S. 127 and U. S. 40 via U. S. 127

From intersection of U. S. 40 and U. S. 127 to Indianapolis, Ind., via U. S. 40

EXHIBIT 18

Between Louisville, Ky., and Cleveland, Ohio

Regular route:

From Louisville, Ky., to intersection of U. S. 31 and Ind. S. R. 9 via U. S. 31, 31W and 31E

From intersection of Ind. S. R. 9 and U. S. 31 to intersection of S. R. 9 and S. R. 7 via S. R. 9

From intersection of S. R. 7 and S. R. 9 to Columbus, Ind., via S. R. 7

From Columbus, Ind., to Indianapolis, Ind., via U. S. 31 (Alternate U. S. 31 between Louisville and Indianapolis)

From Indianapolis, Ind., to intersection of S. R. 67 and Ohio S. R. 32 (33) via Ind. S. R. 67

From intersection of Ohio S. R. 32 (33) and Ind. S. R. 67 via Ohio S. R. 32 (33) to Wapakoneta, Ohio

From Wapakoneta, Ohio, to Lodi, Ohio, via U. S. 224

From Lodi, Ohio, to Cleveland, Ohio, via U. S. 42 (alternate) Ohio S. R. 3 to Cleveland, Ohio

Alternate route:

From Louisville, Ky., to intersection of U. S. 31 and U. S. 50 via U. S. 31

From intersection of U. S. 50 and U. S. 31 to intersection of Ohio S. R. 128 via U. S. 50

From intersection of Ohio S. R. 128 and U. S. 50 to intersection of S. R. 128 and Ohio S. R. 4 via Ohio S. R. 128



From intersection of Ohio S. R. 4 and Ohio S. R. 128 to intersection of Ohio S. R. 4 and U. S. 40 via Ohio S. R. 4

From intersection of U. S. 40 and Ohio S. R. 4 to intersection of U. S. 40 and U. S. 42 via U. S. 40

From intersection of U. S. 42 and U. S. 40 to Cleveland, Ohio, via U. S. 42 (alternate via U. S. 3 from intersection of U. S. 3 and U. S. 42 to Cleveland, Ohio)

EXHIBIT 19

Between Louisville, Ky., and Pittsburgh, Pa.

Regular route:

From Louisville, Ky., to intersection of U. S. 31 and U. S. 50 via U. S. 31

From intersection of U. S. 50 and U. S. 31 to Cincinnati, Ohio, via U. S. 50

From Cincinnati, Ohio, to intersection of U. S. 42 and U. S. 40 via U. S. 42

From intersection of U. S. 40 and U. S. 42 to Cambridge, Ohio, via U. S. 40

From Cambridge, Ohio, to Pittsburgh, Pa., via U. S. 22

Alternate route:

From Louisville, Ky., to intersection of U. S. 31 and Ind. S. R. 9 via U. S. 31, 31E and 31W

From intersection of Ind. S. R. 9 and U. S. 31 to intersection of S. R. 9 and S. R. 7 via Ind. S. R. 9

From intersection of Ind. S. R. 7 and Ind. S. R. 9 to Columbus, Ind., via S. R. 7

From Columbus, Ind., to Indianapolis, Ind., via U. S. 31 (alternate between Louisville, Ky., and Indianapolis, Ind. U. S. 31)

From Indianapolis, Ind., to Cambridge, Ohio, via U. S. 40

From Cambridge, Ohio, to Pittsburgh, Pa., via U. S. 22

Between Cincinnati, Ohio, and Pittsburgh, Pa.

From Cincinnati, Ohio, to intersection of U. S. 42 and U. S. 40 via U. S. 42

From intersection of U. S. 42 and U. S. 40 to Washington, Pa., via U. S. 40

From Washington, Pa., to Pittsburgh, Pa., via U. S. 19

EXHIBIT 20

Between Louisville, Ky., and Chicago, Ill.

Regular route:

From Louisville, Ky., to intersection of U. S. 31 and Ind. S. R. 9 via U. S. 31, 31E and 31W

From intersection of Ind. S. R. 9 and U. S. 31 to intersection of S. R. 9 and S. R. 7 via Ind. S. R. 9

From intersection of Ind. S. R. 7 and Ind. S. R. 9 to Columbus, Ind., via Ind. S. R. 7

From Columbus, Ind., to Indianapolis, Ind., via U. S. 31

From Indianapolis, Ind., to intersection of U. S. 52 and U. S. 41 via U. S. 52

From intersection of U. S. 41 and U. S. 52 to Chicago, Ill., via U. S. 41

Alternate route:

From Louisville, Ky., to Terre Haute, Ind., via U. S. 150

From Terre Haute, Ind., to Chicago, Ill., via U. S. 41

EXHIBIT 21

Between Indianapolis, Ind., and Chicago, Ill.

Regular route:

From Indianapolis, Ind., to intersection of U. S. 52 and U. S. 41 via U. S. 52

From intersection of U. S. 41 and U. S. 52 to Chicago, Ill., via U. S. 41

Alternate route:

A. From Indianapolis, Ind., to Rockville, Ind., via U. S. 36

From Rockville, Ind., to Chicago, Ill., via U. S. 41

B. From Indianapolis, Ind., to Crawfordsville, Ind., via Ind. S. R. 34

From Crawfordsville, Ind., to intersection of Ind. S. R. 43 and U. S. 52 via Ind. S. R. 43

From intersection of U. S. 52 and Ind. S. R. 43 to intersection of U. S. 52 and U. S. 41 via U. S. 52

From intersection of U. S. 41 and U. S. 52 to Chicago, Ill., via U. S. 41

C. From Indianapolis, Ind., to intersection of U. S. 31 and U. S. 6 via U. S. 31

From intersection of U. S. 6 and U. S. 31 to intersection of U. S. 41 via U. S. 6

From intersection of U. S. 41 and U. S. 6 to Chicago, Ill., via U. S. 41

EXHIBIT 22

Between Chicago, Ill., and Cincinnati, Ohio

Regular route:

From Chicago, Ill., to intersection of U. S. 41 and U. S. 52 via U. S. 41

34. UNITED STATES ET AL. VS. HANCOCK TRUCK LINES, INC.

From intersection of U. S. 52 and U. S. 41 to Cincinnati, Ohio,  
via U. S. 52

Alternate route:

A. From Chicago, Ill., to intersection of U. S. 41 and  
U. S. 30 via U. S. 41

From intersection of U. S. 30 and U. S. 41 to Van  
Wert, Ohio, via U. S. 30

From Van Wert, Ohio, to Cincinnati, Ohio, via  
U. S. 127

B. From Chicago, Ill., to intersection of U. S. 41 and  
U. S. 6 via U. S. 41

From intersection of U. S. 6 and U. S. 41 to inter-  
section of U. S. 6 and U. S. 31 via U. S. 6

From intersection of U. S. 31 and U. S. 6 to Indian-  
apolis, Ind., via U. S. 31

From Indianapolis, Ind., to Cincinnati, Ohio, via  
U. S. 52

EXHIBIT 23

Between Chicago, Ill., and Pittsburgh, Pa.

Regular route:

From Chicago, Ill., to intersection of U. S. 41 and U. S. 6 via  
U. S. 41

From intersection of U. S. 6 and U. S. 41 to Waterloo, Ind.,  
via U. S. 6

From Waterloo, Ind., to Angola, Ind., via U. S. 27

From Angola, Ind., to Toledo, Ohio, via U. S. 20

From Toledo, Ohio, to Cleveland, Ohio, via Ohio S. R. 2

From Cleveland, Ohio, to intersection of U. S. 422 and U. S.  
19 via U. S. 422

From intersection of U. S. 19 and U. S. 422 to Pittsburgh,  
Pa., via U. S. 19

Alternate route:

From Chicago, Ill., to Cleveland, Ohio, via U. S. 20

From Cleveland, Ohio, to intersection of U. S. 422 and U. S.  
19 via U. S. 422

From intersection of U. S. 19 and U. S. 422 to Pittsburgh,  
Pa., via U. S. 19

From Chicago, Ill., to intersection of U. S. 41 and U. S. 24  
via U. S. 41

From intersection of U. S. 24 and U. S. 41 to intersection of  
U. S. 24 and U. S. 224 via U. S. 24

From intersection of U. S. 224 and U. S. 24 to intersection of  
U. S. 224 and U. S. 30 via U. S. 224

From intersection of U. S. 30 and U. S. 224 to Pittsburgh, Pa.,  
via U. S. 30

## EXHIBIT 24

Between Detroit, Mich., and Louisville, Ky.

From Detroit, Mich., to Toledo, Ohio, via U. S. 24 and U. S. 25 alternately

From Toledo, Ohio, to Wapakoneta, Ohio, via U. S. 25

From Wapakoneta, Ohio, to intersection of Ohio S. R. 32 (33) and Indiana S. R. 67 via Ohio S. R. 32 (33)

From intersection of S. R. 67 and Ohio S. R. 32 (33) to Indianapolis, Ind., via Indiana S. R. 67

From Indianapolis, Ind., to Louisville, Ky., via U. S. 31, 31E and 31W

Alternate (From Indianapolis, Ind., to Louisville, Ky., via U. S. 31 to Columbus, Ind., thence on Indiana S. R. 7 to Indiana S. R. 9, thence on Indiana S. R. 9 to intersection of U. S. 31, and thence on U. S. 31, 31E, and 31W to Louisville)

## EXHIBIT 25

Between Dayton, Ohio, and Springfield, Ohio

Regular route:

From Dayton, Ohio, to Springfield, Ohio, via Ohio S. R. 4

Alternate route:

From Dayton, Ohio, to Vandalia, Ohio, via U. S. 25

From Vandalia to Springfield, Ohio, via U. S. 40

## EXHIBIT 26

Between Pittsburgh, Pa., and Columbus, Ohio

Regular route:

From Pittsburgh, Pa., to Cambridge, Ohio, via U. S. 22

From Cambridge, Ohio, to Columbus, Ohio, via U. S. 40

Alternate route:

A. From Pittsburgh, Pa., to Washington, Pa., via U. S. 19

From Washington, Pa., to Columbus, Ohio, via U. S. 40

B. From Pittsburgh, Pa., to Cadiz, Ohio, via U. S. 22

From Cadiz, Ohio, to Uhrichsville, Ohio, via U. S. 36 and U. S. 250

From Uhrichsville, Ohio, to Newark, Ohio, via Ohio S. R. 16

From Newark, Ohio, to intersection of Ohio S. R. 13 and U. S. 40 via Ohio S. R. 13

From intersection of U. S. 40 and Ohio S. R. 13 to Columbus, Ohio, via U. S. 40

EXHIBIT 27

Between Cleveland, Ohio, and Pittsburgh, Pa.

From Cleveland, Ohio, to intersection of Ohio S. R. 14 and

Ohio S. R. 8 via Ohio S. R. 14

From intersection of Ohio S. R. 8 and Ohio S. R. 14 to intersection of Ohio S. R. 8 and U. S. 30 via Ohio S. R. 8

From intersection of U. S. 30 and Ohio S. R. 8 to Pittsburgh, Pa., via U. S. 30

Alternate route:

From Cleveland, Ohio, to intersection of U. S. 422 and U. S. 19 via U. S. 422

From intersection of U. S. 19 and 422 to Pittsburgh, Pa., via U. S. 19

EXHIBIT 28

Between Columbus, Ohio, and St. Louis, Mo.

Regular route:

From Columbus, Ohio, to St. Louis, Mo., via U. S. 40

Alternate route:

A. From Columbus, Ohio, to Indianapolis, Ind., via U. S. 40

From Indianapolis, Ind., to intersection of U. S. 36 and U. S. 66 via U. S. 36

From intersection of U. S. 66 and U. S. 36 to St. Louis Mo., via U. S. 66

B. From Columbus, Ohio, to Indianapolis, Ind., via U. S. 40

From Indianapolis, Ind., to intersection of U. S. 36 and U. S. 45 via U. S. 36

From intersection of U. S. 45 and U. S. 36 to intersection of Ill. S. R. 16 via U. S. 45

From intersection of Ill. S. R. 16 and U. S. 45 to intersection of Ill. S. R. 16 and U. S. 66 via Ill. S. R. 16

From intersection of U. S. 66 and Ill. S. R. 140 via U. S. 66

From intersection of Ill. S. R. 140 and U. S. 66 to intersection of Ill. S. R. 140 and U. S. 67 via Ill. S. R. 140

From intersection of U. S. 67 and Ill. S. R. 140 to St. Louis, Mo., via U. S. 67

EXHIBIT 29

Between Cleveland, Ohio, and Cincinnati, Ohio

Regular route:

From Cleveland, Ohio, to Cincinnati, Ohio, via U. S. 42



Alternate route:

From Cleveland, Ohio, to intersection of Ohio S. R. 254 and Ohio S. R. 57 via Ohio S. R. 254

From intersection of Ohio S. R. 57 and Ohio S. R. 254 to intersection of Ohio S. R. 57 and Ohio S. R. 59 via Ohio S. R. 57

From intersection of Ohio S. R. 59 and Ohio S. R. 57 to intersection of Ohio S. R. 59 and Ohio S. R. 4 via Ohio S. R. 59

From intersection of Ohio S. R. 4 and Ohio S. R. 59 to Dayton, Ohio, via Ohio S. R. 4

From Dayton, Ohio, to Cincinnati, Ohio, via U. S. 25

Between Cleveland, Ohio, and Cincinnati, Ohio

From Cleveland, Ohio, to Cincinnati, Ohio, via Ohio S. R. 3

EXHIBIT 33

Between Buffalo, N. Y., and Pittsburgh, Pa.

Regular route:

From Buffalo, N. Y., to Erie, Pa., via U. S. 20 and N. Y. S. R. 5 alternately

From Erie, Pa., to Pittsburgh, Pa., via U. S. 19

Between St. Louis, Mo., and Buffalo, N. Y.

Regular route:

From St. Louis, Mo., to Indianapolis, Ind., via U. S. 40

From Indianapolis, Ind., to intersection Ind. S. R. 67 and Ohio S. R. 32 (33) via Ind. S. R. 67

From intersection of Ohio S. R. 32 (33) and Ind. S. R. 67 to Wapakoneta, Ohio, via Ohio S. R. 32 (33)

From Wapakoneta to Findlay, Ohio, via U. S. 25

From Findlay, Ohio, to Lodi, Ohio, via U. S. 224

From Lodi, Ohio, to Cleveland, Ohio, via U. S. 42

From Cleveland, Ohio, to intersection of U. S. 20 and Ohio S. R. 84 via Ohio S. R. 84

From intersection of U. S. 20 and Ohio S. R. 84 to Buffalo, N. Y., via U. S. 20 and N. Y. S. R. 5, alternatively

Alternate route:

From St. Louis, Mo., to Cincinnati, Ohio, via U. S. 50

From Cincinnati, Ohio, to Cleveland, Ohio, via Ohio S. R. 3

From Cleveland, Ohio, to intersection of U. S. 20 and Ohio S. R. 84 via Ohio S. R. 84

From intersection of U. S. 20 and Ohio S. R. 84 to Buffalo, N. Y., via U. S. 20 and N. Y. S. R. 5, alternatively

Between Buffalo, N. Y., and Chicago, Ill.

Regular route:

From Buffalo, N. Y., to intersection of U. S. 20 and N. Y. S. R. 5 via N. Y. S. R. 5

From intersection of N. Y. S. R. 5 and U. S. 20 to Cleveland, Ohio, via U. S. 20 and Ohio S. R. 84 alternatively  
 From Cleveland, Ohio, to Toledo, Ohio, via Ohio S. R. 2  
 From Toledo, Ohio, to intersection of Ohio S. R. 263 and U. S. 20 via Ohio S. R. 263  
 From intersection of U. S. 20 and Ohio S. R. 263 to intersection of U. S. 20 and U. S. 27 via U. S. 20  
 From intersection of U. S. 27 and U. S. 20 to intersection of U. S. 27 and U. S. 6 via U. S. 27  
 From intersection of U. S. 6 and U. S. 27 to intersection of U. S. 41 and U. S. 6 via U. S. 6  
 From intersection of U. S. 41 and U. S. 6 to Chicago, Ill., via U. S. 41

Between Indianapolis, Ind., and Buffalo, N. Y.

Regular route:

From Indianapolis, Ind., to intersection Ind. S. R. 67 and Ohio S. R. 32 (33) via Ind. S. R. 67.  
 From intersection of Ohio S. R. 32 (33) and Ind. S. R. 67 to Wapakoneta, Ohio, via Ohio S. R. 32 (33)  
 From Wapakoneta, Ohio, to Findlay, Ohio, via U. S. 25  
 From Findlay, Ohio, to Lodi, Ohio, via U. S. 224  
 From Lodi, Ohio, to Cleveland, Ohio, via U. S. 42  
 From Cleveland, Ohio, to intersection of U. S. 20 and Ohio S. R. 84 via Ohio S. R. 84  
 From intersection of U. S. 20 and Ohio S. R. 84 to Buffalo, N. Y., via U. S. 20 and N. Y. S. R. 5 alternatively

Between Louisville, Ky., and Buffalo, N. Y.

Regular route:

From Louisville, Ky., to Cleveland, Ohio, via U. S. 42  
 From Cleveland to intersection of U. S. 20 and Ohio S. R. 84 via Ohio S. R. 84  
 From intersection of U. S. 20 and Ohio S. R. 84 to Buffalo, N. Y., via U. S. 20 and N. Y. S. R. 5 alternatively

## APPENDIX B

### *Authority granted*

Service in accordance with the findings in the accompanying report is authorized (1) between Chicago, Ill., and St. Louis, Mo., (2) between St. Louis and Cincinnati, Ohio, (3) between Louisville, Ky., and Cincinnati, (4) between Indianapolis, Ind., and Cincinnati, (5) between Indianapolis and Cleveland, Ohio, (6) between St. Louis and Dayton, Ohio, (7) between Louisville and Indianapolis, (8) between St. Louis and Louisville, (9) between St. Louis and Cleveland, (10) between St. Louis and Pittsburgh,

Pa., (11) between Indianapolis and St. Louis, (12) from Akron, Ohio, to St. Louis, (13) from Indianapolis to Detroit, Mich., (14) from Indianapolis to Pittsburgh, (15) between Louisville and Pittsburgh, (16), between Louisville and Chicago, Ill., (17) between Indianapolis and Chicago, (18) between Cincinnati and Chicago, (19) from Chicago to Pittsburgh, (20) between Detroit and Louisville, (21) from Cleveland to Pittsburgh, (22) between Buffalo, N. Y., and St. Louis, and (23) between Buffalo and Indianapolis, over the highways listed below or any combination thereof:

Route No.	Over highway	Between
1	U. S. Highway 66	St. Louis and Chicago.
2	Illinois Highway 48	Junction of U. S. Highway 66 with Illinois Highway 48 and Onarga, Ill.
3	U. S. Highway 45	Onarga and the junction of U. S. Highway 45 with U. S. Highway 66.
6	U. S. Highway 36	Springfield, Ill., and the junction of U. S. Highway 36 with Indiana Highway 9.
7	U. S. Highway 40	St. Louis and Cambridge, Ohio.
8	U. S. Highway 50	St. Louis and Miami, Ohio.
9	U. S. Highway 50	Terre Haute, Ind., and Louisville.
10	U. S. Highway 52	Junction of U. S. Highway 41 with U. S. Highway 52 near Gravel Hill, Ind., and Cincinnati.
11	U. S. Highway 31	Junction of U. S. Highway 6 with U. S. Highway 31 and Sellersburg, Ind.
12	U. S. Highway 31W or 31E	Sellersburg and Louisville.
13	U. S. Highway 41	Chicago and Terre Haute.
14	U. S. Highway 20	Chicago and Cleveland.
15	U. S. Highway 6	Junction of U. S. Highway 41 with U. S. Highway 6 and Waterloo, Ind.
16	U. S. Highway 27	Waterloo and Angola, Ind.
17	Indiana Highway 9	Junction of U. S. Highway 36 with Indiana Highway 9 and Huntington, Ind.
18	U. S. Highway 24	Chenoa, Ill., and Huntington, Ind.
19	Indiana Highway 87	Indianapolis and Indiana-Ohio State line.
20	Ohio Highway 29	Indiana-Ohio State line and St. Marys, Ohio.
21	U. S. Highway 33	St. Marys, Ohio, and Wapakoneta.
22	U. S. Highway 224	Huntington and Deerfield, Ohio.
23	U. S. Highway 127	Cincinnati and Van Wert.
24	U. S. Highway 24	Toledo and the junction of U. S. Highway 24 with U. S. Highway 25.
25	U. S. Highway 25	Wapakoneta and Detroit.
26	U. S. Highway 35	Junction of U. S. Highway 40 with U. S. Highway 35 and Dayton.
27	U. S. Highway 25	Dayton and Vandalia, Ohio.
30	Ohio Highway 264	Cleves, Ohio, and Cincinnati.
31	Ohio Highway 128	Miami and Hamilton.
32	U. S. Highway 42	Louisville and Cleveland.
33	U. S. Highway 30	Junction of U. S. Highway 41 with U. S. Highway 30 and Delphos, Ohio.
34	U. S. Highway 30N	Delphos and Mansfield.
35	U. S. Highway 30	Mansfield and Pittsburgh.
36	Ohio Highway 2	Toledo and Cleveland.
37	Ohio Highway 3	Columbus and Cleveland.
38	Ohio Highway 79	Hebron and Newark, Ohio.
39	Ohio Highway 16	Newark and Coshocton.
40	U. S. Highway 36	Coshocton and Cadiz, Ohio.
41	U. S. Highway 22	Cambridge and Pittsburgh.
42	Ohio Highway 14	Deerfield and Ohio-Pennsylvania State line.
43	Pennsylvania Highway 51	Ohio-Pennsylvania State line and Pittsburgh.
44	U. S. Highway 39	Pittsburgh and Portersville, Pa.
45	U. S. Highway 422	Portersville and Cleveland.
46	Ohio Highway 8	Canton and Bedford, Ohio.
47	Ohio Highway 14	Bedford and Cleveland.
48	Ohio Highway 64	Cleveland and Ashtabula.
49	U. S. Highway 20	Ashtabula and Big Tree, N. Y.
50	New York Highway 5	Silver Creek and Buffalo.
51	U. S. Highway 62	Big Tree and Buffalo.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 7th day of October, A. D. 1942

No. MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

No. MC-3340

GLOBE CARTAGE COMPANY, INC., CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in these proceedings having been made, and said division on the date hereof having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That application in No. MC-3340 be, and it is hereby, denied.

It is further ordered, That application in No. MC-3339, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That this order shall become effective November 24, 1942.

By the Commission, division 5.

[SEAL]

W. P. BARTEL, *Secretary.*

*Exhibit "B" to Complaint*

INTERSTATE COMMERCE COMMISSION

No. MC-3339<sup>1</sup>

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

*Decided August 4, 1943*

On reconsideration, findings in prior reports, 41 M. C. C. 313 and 41 M. C. C. 303, modified. Applicants found entitled to authority to continue operations as common carriers by motor vehicle of general commodities with certain exceptions, between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, and Pennsylvania, over regular routes, in the trans-

<sup>1</sup> This report also embraces No. MC-3340, Globe Cartage Company, Inc., Contract Carrier Application; No. MC-70614, The Barnett Trucking Company Common Carrier Application; and No. MC-23458, The Barnett Trucking Company Contract Carrier Application.

portation of commodities which are moving on bills of lading of freight forwarders. Issuance of certificates approved upon compliance by applicants with certain conditions, and applications in all other respects denied.

Appearances as shown in prior reports with addition of Ezra Weiss for applicant and Robert J. McBride and J. Manley Head for intervener in Nos. MC-3339 and MC-3340.

#### REPORT OF THE COMMISSION ON RECONSIDERATION

##### BY THE COMMISSION:

In the prior report in Nos. MC-3339 and MC-3340, 41 M. C. C. 313, division 5 found applicant, hereafter referred to as Globe, entitled to a "grandfather" certificate authorizing continuance of operations as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities, over specified regular routes, between, or from and to, specified points in the territory extending from St. Louis, Mo., on the west, to Buffalo, N. Y., and Pittsburgh, Pa., on the east, and from Louisville, Ky., on the south, to Chicago, Ill., on the north. The applications were in all other respects denied.

In the prior report in Nos. MC-70614 and MC-23458, 41 M. C. C. 303, division 5 found applicant, hereafter referred to as Barnett, entitled to a "grandfather" certificate authorizing continuance of operations as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over a specified route between Pittsburgh and Cincinnati, Ohio, serving Columbus and Dayton, Ohio, as intermediate points. The applications were in all other respects denied.

Intervener. The Regular Common Carrier Conference of The American Trucking Associations, Inc., and numerous rail and motor-carrier protestants filed petitions for reconsideration in Nos. MC-3339 and MC-3340. One of the petitions seeks oral argument. Applicant and a number of motor-carrier interveners filed petitions for reconsideration and oral argument in Nos. MC-70614 and MC-23458. All of the protestants and interveners urge that division 5 erred in failing "to restrict the authority" granted to applicants to traffic which is, at the time of transportation by them, in the primary custody of and moving on bills of lading of freight forwarders, as defined in section 402 (a) (5) of part IV of the Interstate Commerce Act. Certain protestants in Nos. MC-3339 and MC-3340 urge that division 5 erred in failing "to restrict and limit" the authority granted to Globe to traffic which is in the primary custody of and moving on bills of lading of Universal Carloading & Distributing Company, and "to truck-load movements only." Neither protestants nor interveners ques-



tion applicants' rights to authority to continue operations as motor carriers of general commodities between the points and over the routes specified in the prior reports. In its petition, Barnett urges that it is entitled to authority to serve numerous points in Ohio, Pennsylvania, and New York in addition to those specified by division 5. Upon consideration of the petitions and of the records herein, we have vacated the orders entered by division 5 and reopened the proceedings for reconsideration. The questions raised in the petitions have been fully developed therein and on the records, and we have therefore denied the requests for oral argument.

Applicants have been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, except commodities in bulk and those of unusual length, height, or weight. During this entire period, Globe and Barnett have transported only traffic tendered to them by the Universal Carloading & Distributing Company and the National Carloading Corporation, respectively. Each of the latter is a freight forwarder as defined in part IV of the act. In the prior reports herein, following our decisions in *Acme Fast Freight, Inc.*, Common Carrier Application, 8 M. C. C. 211, and *Bleich Common Carrier Application*, 27 M. C. C. 9, division 5 found that applicants have been and are common carriers. None of the petitioners question these findings. Part IV of the act was added in 1942. In section 402 (a) (3), it defines freight forwarders as follows:

"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

This definition indicates quite plainly the character of service which freight forwarders perform, and it furnishes no basis for changing our conception of freight forwarders disclosed in the many decisions, including those cited above, in which we considered the nature of their operations prior to the enactment of part IV. In this connection, it should be noted that section 418

of part IV prohibits freight forwarders from employing or utilizing the instrumentalities of any carriers other than common carriers by motor vehicle, railroad, air, or water except in the performance within terminal areas of transfer, collection or delivery services. The enactment of part IV of the act in no way affects the soundness of our decisions referred to above. We can perceive no reason for departing from the views expressed therein, and we accordingly affirm the findings of division 5 that applicants have been and are common carriers by motor vehicle.

Barnett contends that it should be granted authority to serve various points named in its application. It refers to the recommendation of the examiner that it be authorized to operate over a specified route between Pittsburgh and Cleveland, Ohio, serving Akron, Canton, and Youngstown, Ohio, as intermediate points. An examination of the record discloses that the only traffic transported by it between these points prior to June 1, 1935, was a single shipment, moved in March 1932 from Cleveland to Pittsburgh. There was no further operation between these points until some time in 1936. Its operations between other points and the operations conducted by Globe are accurately described in the prior reports. In our opinion, there is no basis for the granting of authority under the "grandfather" clause of the act to either Barnett or Globe except between the points and over the routes specified by division 5 in the prior reports.

We come now to the contentions of protestants and interveners that division 5 failed properly "to restrict the authority" granted to applicants. Division 5 found that we cannot, consistently with applicants' common-carrier status, restrict their service to particular shippers. We believe this is a correct statement of the law. Section 203 (a) (14) of the act provides that the term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for compensation. A motor carrier whose service is restricted or limited to particular shippers of the ordinary kind obviously would not be a common carrier. Applicants are, however, as we have already determined, common carriers and are entitled to authority to continue operations as such. We are without power to restrict or limit their operations in a manner which would change their status from that of common carriers.

We are satisfied, however, that, in the circumstances here present, the relation between applicants and the freight forwarders should not be treated the same as that existing between an ordinary shipper and a motor common carrier. We pointed out in Bleich Common Carrier Application, supra, that the forwarder

is not like an ordinary shipper who tenders its own goods to a carrier for transportation. The forwarder merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers or consignees that it will undertake to have the same transported to ultimate destinations. During the "grandfather" period, the freight forwarders have tendered to applicants, and applicants have transported, not traffic belonging to the forwarders but freight belonging to the general public, which the forwarders accepted and assembled as the result of the understanding with the shippers or consignees thereof that they would undertake to have the same transported. The facts which satisfy the requirement, insofar as applicants are concerned, that to be a common carrier there must be a holding out to transport for the general public are, first, that the forwarders dealt with the shipping public in general and did not limit their activities to selected shippers, and, second, that applicants transported traffic of the shipping public in general which was assembled by the forwarders as a result of the latter's undertaking to have the same transported. Under these circumstances, we think the freight forwarders must be treated, not as ordinary shippers, but as intermediary agencies through which applicants held themselves out to the general public to engage in the transportation of property by motor vehicle. To grant applicants authority to transport only traffic assembled by freight forwarders would enable them to continue all bona fide common-carrier operations in which they have been engaged during the "grandfather" period. They are entitled to no more or no less than this under the "grandfather" clause of section 206 (a) of the act. The issuance to them of certificates authorizing the transportation of general commodities (with the exceptions previously indicated) which are at the time moving on bills of lading of freight forwarders, would effectively accomplish this purpose.

Applicants' operations during the "grandfather" period may be likened to the operations of common carriers of special commodities. In cases too numerous to require citation, we have found that common carriers who have transported special commodities only are entitled, not to authority to transport general commodities, but to authority to continue transporting such special commodities. Common carriers of petroleum products, in bulk, in tank trucks, furnish an example: Obviously only a small part of the general public ever has occasion to ship petroleum products, in bulk, in tank trucks. The service of such carriers is therefore in fact available only to a small part of the public.

To "specify the service to be rendered" by "such carriers in the certificates issued to them, in accordance with the provisions of section 208 (a) of the act, as the transportation of petroleum products, in bulk, in tank trucks, does not, however, constitute a restriction of their service to particular shippers. On the contrary, it constitutes a grant of authority to transport petroleum products, in bulk, in tank trucks, for anyone who offers such traffic for transportation.

Applicants have transported only traffic assembled by freight forwarders. Their service has therefore been rendered only to that part of the public which dealt with freight forwarders. To authorize them to continue the transportation of traffic assembled by freight forwarders would not constitute a restriction of their service to particular shippers. On the contrary, their service would continue to be available to the public to the same extent as it has been during the "grandfather" period. However, to authorize applicants to transport traffic, other than that assembled by freight forwarders, would permit them to enlarge and expand their operations beyond the scope of the transportation businesses in which they have been engaged. The issuance of authority to engage in such enlarged and expanded operations would not be in harmony with the "grandfather" provisions of the act.

We find no merit in the contention of certain protestants that we should "restrict the authority" issued to Globe to "truckload movements only." Its holding out to the general public, in the manner described above, was not limited to the transportation of truckload shipments. In fact, a substantial part of the traffic handled by it consisted of small shipments made by the general public. We think it is entitled to authority to transport both truckload and less-than-truckload shipments. The same protestants urge that we should restrict Globe to the transportation of shipments moving on bills of lading of the single freight forwarder, Universal Carloading & Distributing Company, which has assembled all traffic which Globe has transported during the "grandfather" period. We think that such a limitation is not warranted but that Globe is entitled to authority to transport traffic moving on bills of lading of any freight forwarder.

On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk and those of unusual length, height, or weight) which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports.

Upon compliance by applicants with the requirements of sections 215 and 217 of the act, and our rules and regulations there-



under, appropriate certificates will be issued. The applications in all other respects will be denied.

PATTERSON, Commissioner, dissenting:

The single issue here is whether a motor carrier which, during the "grandfather" period, and since, has rendered, pursuant to a contractual arrangement, a highly specialized transportation service exclusively for a single forwarder and which has not rendered or held itself out to render transportation service for any other person, can be held to have been operating as a common carrier by motor vehicle and to be entitled to a certificate as a common carrier under section 206 (a) of the act. The service rendered consists of terminal-to-terminal line-haul movement of trucks containing only such merchandise as is loaded therein by such forwarder.

A common carrier, both at common law and under the Interstate Commerce Act, is one that holds itself out to serve the "general public." As such, it is bound, within the scope of its operations, to transport for all impartially. It is the right of the public to use the carrier's facilities and to demand service of it which is the real criterion of whether a particular carrier is a common carrier. *Tap Line Cases*, 234 U. S. 1. Neither the forwarder's patrons nor any portion of the public had or has any such right in the situation here under consideration, the motor-carrier service being available to a single forwarder only under a special contract with it.

It would seem that the bare statement of the situation ought to suffice conclusively to establish the contract-carrier status of such a motor carrier, and doubtless the majority would have so held if the transportation contract had been with a person other than a forwarder. But, confronted by the fact that by section 418 of the act a forwarder is now prohibited from utilizing the services of carriers other than common carriers, except in terminal areas, and that a holding that the considered motor-carrier operations were those of a motor contract carrier would have the effect of preventing the carrier from continuing operations as conducted by it in the past, the majority, in order to avoid such a result, have attempted to stretch and pull the generally recognized and accepted concept of what constitutes a common carrier in support of their conclusion that these operations were those of a common carrier. That conclusion is without support, in my opinion, in fact or in law.

The argument advanced amounts to this: That because a forwarder, in relation to its patrons who tender it small packages or lots of goods, serves the general public, any motor carrier whose services the forwarder may choose to utilize in carrying out its



individual undertakings with its various patrons to have such goods transported ipso facto also serves the general public and becomes therefore a common carrier. The fallacy of this argument lies in the fact that in such a case the motor carrier has no contractual relation whatever with the forwarder's patrons, it undertakes to transport for the forwarder only and with respect to an entirely different unit of transportation, it has no liability to the forwarder's patrons but its liability is to the forwarder only, and the forwarder's relation to the transporting carrier has uniformly been held to be that of a shipper who must be treated by the carrier, if a common carrier, in all respects the same as any other shipper without regard to the forwarder's previous dealings with its patrons. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co. v. United States*, 243 U. S. 444. That the Congress, in subjecting forwarders to regulation under part IV of the Interstate Commerce Act, fully recognized this is definitely and clearly disclosed by the legislative history. That history shows that it was the purpose of that legislation to prevent a forwarder, as a shipper over the line of motor or other carriers, from securing transportation at a less price than common-carrier rates open and available to other shippers. Among other provisions, the provision of section 418 prohibiting the utilization by a forwarder, except in terminal areas, of other than common carriers was in furtherance of that purpose. The effect of the majority holding, and the reasoning in support thereof, is to render this prohibition meaningless by declaring that any motor carrier, even though admittedly a contract carrier and authorized to operate as such, is automatically transformed into a common carrier if any persons, or the only person, engaging its services should happen to be, with or without such carrier's knowledge, a forwarder. And under the same reasoning, a motor carrier utilized by a forwarder in a terminal area would likewise ipso facto become a common carrier although section 418 recognizes that within such areas a forwarder may utilize either a contract or a common carrier. The Commission in the *Aefne* case, 8 M. C. C. 211, recognized that forwarders employed motor contract carriers as well as motor common carriers. It is now held by the majority here that there can be no such thing as a motor contract carrier of forwarder shipments.

Failure to recognize the clear distinction between the dealings of the forwarder with its patrons and the entirely separate and distinct dealings of the forwarder with the motor carrier, and the attempt to combine the two to support the conclusion reached, serve only to produce a confusion of thought obscuring the fundamental issue.

Authority may not be granted under the "grandfather" clause which will permit a carrier to expand its operations beyond the scope of those conducted in the past. The majority concede that to restrict the authorized operations to service for a particular shipper or particular shippers (in this case a forwarder, for the motor carrier had no transportation dealings with anyone else), would be inconsistent with common-carrier status and that a motor carrier, whose service is so limited, "obviously would not be a common carrier." They seek to maintain the integrity of the finding that the operations were in fact those of a common carrier, and at the same time to "effectively accomplish the purpose" of restricting the operations to service for forwarders, by limiting the authority to the transportation of commodities "which are at the time moving on bills of lading of freight forwarders." Their argument is that this is a restriction as to the character of traffic and does not constitute a restriction of service to particular shippers. But, if we look back of the form of the restrictive words to what caused them and what they are intended to cause and do cause, it is obvious that they can have no other effect than to restrict the carrier's service to that for forwarders only, for the only traffic that can possibly be moving at the time on forwarder bills of lading is that tendered to the carrier by forwarders. Where common-carrier operations are lawfully limited to the handling of a particular class of traffic, any person having such traffic to transport is entitled to avail himself of the carrier's service at the published tariff rates named for such service. Here, however, the carrier's service and its published tariff rates consistent with the above restriction can be availed of only by forwarders—not by the forwarder's patrons or by any other person. Thus a shipper, such as Montgomery Ward or Sears Roebuck, desiring to make a shipment over the line of the motor carrier under the same conditions and at the same rate as applicable to a like shipment by a forwarder would be prevented from doing so. It could obtain that particular service, if at all, only by employing the forwarder and paying the forwarder's charges, and even then would have no right to demand of the forwarder that the goods be transported over the line of that particular carrier.

If such a motor carrier is a common carrier, it may not limit its service to a single forwarder, or even to forwarders, but must render like transportation service for others at like rates. It cannot legally enter into a contract with a forwarder for such transportation unless it makes, publishes, and applies for such service a rate open to all. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155.

If the decision of the majority is sound in principle, their particular forwarders or groups of forwarders are free to utilize par-

ticular "common carriers" whose loaded-truck facilities are devoted exclusively to such forwarders. By reason of the ensuing large and steady volume of traffic, such carriers would presumably be in a position profitably to accord lower rates than common carriers serving shippers generally could afford to maintain. The latter carriers would thus be prevented from handling such traffic at all, either directly at less-than-carload or less-than-truckload rates or for the forwarder at their carload or truckload rates, and the principal occasion for operations of a forwarder, namely, to supplement and coordinate the services offered by regular common carriers by consolidating into carload or truckload lots articles of merchandise which such common carriers would otherwise be called upon to transport in less-than-carload or less-than-truckload lots, would cease to exist.

Considerations of expediency, or of supposed hardship that might result from a finding that the operations were those of a contract carrier do not justify declaring a contract carrier to be a common carrier. If applicants desire authority to operate as common carriers in order that they may continue to serve forwarders as in the past, and, as required of common carriers, to make their services available also to others, they should file an appropriate application.

24

## ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of August, A. D. 1943

No. MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

No. MC-3340

GLOBE CARTAGE COMPANY, INC., CONTRACT CARRIER APPLICATION

No. MC-70614

THE BARNETT TRUCKING COMPANY COMMON CARRIER APPLICATION

No. MC-23458

THE BARNETT TRUCKING COMPANY CONTRACT CARRIER APPLICATION

It appearing, That on October 7, 1942, the Commission, division 5, entered its reports and orders in the above-entitled matters

granting the applications in certain respects, and denying the applications in all other respects;

It further appearing, That petitions for reconsideration and oral argument have been filed by applicant in Nos. MC-70614 and MC-23458 and by various protestants and interveners in all of the above-entitled proceedings:

It is ordered, Upon further consideration of the records herein, and of the said petitions, that the proceedings be, and they are hereby, reopened for reconsideration on the records as made; that the said orders of October 7, 1942, be, and they are hereby, vacated and set aside; and that the said petitions be, and they are hereby, in all other respects denied.

It further appearing, That, full investigation and reconsideration of the matters and things involved in these proceedings have been made, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and said reports of October 7, 1942, are hereby referred to and made a part hereof:

It is ordered, That the said applications, except to the extent that certificates are granted in the said report on reconsideration, be, and they are hereby, denied, effective October 6, 1943.

By the Commission.

[SEAL]

W. P. BARTEL, *Secretary*.

25

*Exhibit C to Complaint*

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-25567 (Sub No. 8)

HANCOCK TRUCK LINES, INC., SUCCESSOR TO GLOBE CARTAGE COMPANY, INC.

Formerly No. MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON-CARRIER APPLICATION

No. MC-3340

GLOBE CARTAGE COMPANY, INC., CONTRACT CARRIER APPLICATION,  
EVANSVILLE INDIANA

Present: Charles D. Mahaffie, Commissioner, to whom the matters which are the subject of this order have been assigned.

Upon consideration of the records in the above-entitled proceedings; and good cause appearing:

It is ordered, That the order entered in said proceedings on August 4, 1943, as subsequently modified to become effective February 29, 1944, insofar as it denied the applications, be, and it is hereby, further modified so as to become effective on March 31, 1944.

Dated at Washington, D. C., this 21st day of February, A. D. 1944.

By the Commission, Commissioner Mahaffie.

[SEAL]

W. P. BARTEL, *Secretary*.

26

*Exhibit D to complaint*

### ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of March, A. D. 1944

No. MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

No. MC-3340

GLOBE CARTAGE COMPANY, INC., CONTRACT CARRIER APPLICATION

Now No. MC-25567 (Sub. No. 8)

HANCOCK TRUCK LINES, INC., SUCCESSOR TO GLOBE CARTAGE COMPANY, INC., EVANSVILLE, INDIANA

Upon consideration of the record in the above-entitled proceedings, and of petition of applicant, Hancock Truck Lines, Inc., dated February 18, 1944, for modification of the effective date of the denial order of August 4, 1943, by postponement thereof until December 31, 1944, or for such time as the Commission considers just and reasonable; and good cause appearing:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[SEAL]

W. P. BARTEL, *Secretary*.

27

(Entry for March 29, 1944, continued)

And thereupon there was issued out of the office of the Clerk of this Court a writ of summons for the defendants to the United States Marshal.



[Title omitted.]

*Stipulation*

Filed March 30, 1944

Comes now the plaintiff, Hancock Truck Lines, Inc., by Jacob Weiss, Albert Ward, and Ferdinand Born, its attorneys; come also the defendants United States and Interstate Commerce Commission, by B. Howard Caughran, United States Attorney, their attorney, and it is hereby stipulated by and between the parties that the effective date of the order complained of in the complaint, shall be, and is hereby extended until May 1, 1944, in all respects pursuant to the terms of the telegram received by said United States Attorney on this date from Reidy, such telegram being of the following tenor:

"ND.CA 153 C.W.A. 35 1944 Mar 30 AM 10 31

WUSB6W (TWO 42 GOVT-SB WASHINGTON DC 30 1101A—

B. HOWARD CAUGHRAN—

US ATTORNEY FEDERAL BLDG (INDIANAPOLIS IND)

PURSUANT TO TELEPHONE CONVERSATION OF THIS MORNING COMMISSIONER PORTER HAS AUTHORIZED EXTENSION OF MARCH 31 EFFECTIVE DATE OF ORDER IN HANCOCK TRUCK LINES CASE UNTIL MAY 1, 1944. ORDER TO THAT EFFECT WILL FOLLOW. JUSTICE DEPARTMENT CONSULTED AND CONCURS IN THIS RESULT—

REIDY—

31 1 1944"

And the plaintiff now withdraws its application for a restraining order.

Dated this 30th day of March 1944.

HANCOCK TRUCK LINES, INC.,

By JACOB WEISS,

ALBERT WARD,

FERDINAND BORN,

*Its Attorneys.*

UNITED STATES AND INTERSTATE  
COMMERCE COMMISSION

By (S) B. HOWARD CAUGHRAN,

*Their Attorney.*

30

(Entry for March 30, 1944 continued)

and which, upon examination, the court now approves, and plaintiff now withdraws its application for a restraining order.

31

In United States District Court

*Designation of judges*

Comes now Honorable William M. Sparks, Acting Senior United States Circuit Judge, and files assignment of Honorable Sherman Minton, United States Circuit Judge, and Honorable Luther M. Swygert, United States District Judge, to sit as Judges in this cause, which assignment is as follows:

The assignment of two judges by the undersigned being required under Sec. 380a, 28 U. S. C. A., Act of 1937, I hereby designate and assign the Honorable Sherman Minton, United States Circuit Judge in and for the Seventh Judicial Circuit, and the Honorable Luther M. Swygert, United States District Judge for the Northern District of Indiana, to sit as judges in the above entitled cause.

(Signed) WILLIAM M. SPARKS,

*Acting Senior United States Circuit Judge**in and for the Seventh Judicial Circuit.*

CHICAGO, ILLINOIS, April 1, 1944.

33

In the District Court of the United States

[Title omitted.]

*Answer of the United States of America*

Filed April 5, 1944

Now comes the United States of America, defendant herein, and in answer to the complaint says:

1. Admits the allegations of paragraphs 1 and 2 of the complaint.

2. Admits the allegations of paragraph 3 of the complaint, except denies that this action arises under the Fifth Amendment of the Constitution of the United States.

3. Admits the allegations of paragraph 4 of the complaint but for further answer thereto alleges that so far as the validity of the present order of the Commission is concerned it is immaterial whether plaintiff's operations over its other routes are directly related to the operations over the routes here involved.

4. Admits the allegations of paragraphs 5 and 6 of the complaint.

5. Admits the allegations of paragraph 7 of the complaint  
34 but alleges for further answer that Commissioner Rogers in a separate concurring opinion stated that applicant's authority should be restricted to carriage for freight forwarders, and that Commissioner Patterson dissented on the ground that because applicant carried only for freight forwarders it was a contract carrier and not a common carrier.

6. Admits the allegations of paragraphs 8 through 10 of the complaint but refers the Court to the Commission's reports herein (attached to the complaint as Exhibits A and B) for a more complete statement concerning the matters mentioned in these paragraphs than is contained in said paragraphs.

7. Admits the allegations of paragraph 11 of the complaint except that it denies that the Commission's action was without right or contrary to law.

8. Admits the allegations of paragraph 12 of the complaint but alleges that the Commission, at the request of this Court, has now extended the effective date of its order until May 1, 1944.

9. Admits the allegations of paragraph 13 of the complaint.

10. Admits the allegations of paragraph 14 of the complaint but denies that any order of the Commission with respect to Barnett Trucking Company is of any materiality here.

11. Denies the allegations of paragraph 15 of the complaint.

12. In answer to the allegations of paragraph 16 of the complaint alleges that such allegations are immaterial so far as the validity of the Commission's order is concerned and require no answer, since plaintiff is required and entitled to carry property only in accordance with the present order of the Commission if that is valid.

13. Admits the allegations of paragraph 17 of the complaint, except denies that the Commission's order is in any respect  
35 void, illegal or invalid

14. In answer to paragraph 18 of the complaint admits that plaintiff has lawfully acquired the business and property of Globe Carthage Co., Inc. Denies that plaintiff is subjected to any unlawful injury by the Commission's order. For further answer alleges that the allegations contained herein as to operations conducted by plaintiff over these or other routes since the acquisition of these routes by plaintiff, are immaterial so far as the validity of the Commission's order is concerned, since these operations do not in any way relate to the grandfather rights of plaintiff's predecessor and plaintiff could only acquire what its predecessor had to give.

Wherefore: It is respectfully prayed that the complaint be dismissed.

ROBERT L. PIERCE,  
Robert L. Pierce,

*Special Assistant to the Attorney General,  
Department of Justice, Washington, D. C.,  
Attorney for the United States of America, defendant.*

WENDELL BERGE,  
*Assistant Attorney General.*

B. HOWARD CAUGHYAN,  
*United States Attorney.*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above answer upon each of the following counsel this 4th day of April 1944, by mailing them a copy thereof:

Jacob Weiss, Esquire, 512 Insurance Building, Indianapolis, Indiana.

36 Albert Ward, Esquire, 318 Insurance Building Indianapolis, Indiana.

Ferdinand Born, Esquire, 718 Chamber of Commerce Building, Indianapolis, Indiana.

Nelson Thomas, Esquire, Interstate Commerce Commission, Washington 25, D. C.

ROBERT L. PIERCE,  
Robert L. Pierce,

*Special Assistant to the Attorney General.*

38 In United States District Court

[Title omitted.]

[File endorsement omitted.]

*Answer of Interstate Commerce Commission*

Filed April 6, 1944

Comes now the Interstate Commerce Commission, hereinafter called the Commission, defendant herein, and for its answer to the complaint filed in the above-entitled proceeding, respectfully shows:

I

For the purposes of this suit and none other, the Commission admits the allegations of paragraphs 1, 2, and 3 of the com-

plaint, except that it denies the allegation of paragraph 3 that this action arises under or involves any rights under the Fifth Amendment to the Constitution of the United States or any other portion thereof, and the Commission further alleges and shows that the effective date of the Commission's order of August 4, 1943, was on March 28, 1944, further modified so as to extend the effective date thereof from March 31, 1944, to May 1, 1944.

## II

Answering paragraph 4 of the complaint, the Commission admits that the plaintiff is and has been a common carrier by motor vehicle in interstate and foreign commerce of general commodities and is now the holder of certain certificates of public convenience and necessity issued by the Commission which differ from that issued by the Commission pursuant to the "grandfather" application of Globe Cartage Company, Inc., hereinafter called Globe, in proceeding No. MC-3339, but the Commission alleges and shows that there is no legal relation, direct or otherwise, between the operations originally performed by the plaintiff and the Globe operations upon which are based the rights subsequently purchased by plaintiff.

## III

Answering the allegations of paragraphs 5, 6, 7, 8, 9, 10, and 11 of the complaint, the Commission admits the allegations therein contained, except that the Commission alleges and shows that the quotations from the reports of Division 5 and of the entire Commission in the Globe proceeding, and the statements as to the substance, force and effect of the Commission's reports, orders and actions in said proceeding are not full, true or correct statements thereof, and the Commission respectfully refers the Court to the copies of the reports and orders of the Commission which are attached as Exhibits A, B, C, and D, to the complaint herein for full information as to the Commission's actions in the premises; and except that the Commission denies that as alleged in the last three lines of paragraph 11, the freight forwarder commodities limitation referred to in said paragraph is contrary to law.

## IV

Answering paragraphs 12, 13, and 14 of the complaint, the Commission admits the truth thereof, except that subsequent to the bringing of this suit the effective date of the Commission's order of August 4, 1943, has been further postponed to May 1, 1944;



and the Commission alleges and shows that the action of the Commission with regard to the application of Barnett  
40 Trucking Company referred to in paragraph 14 of the complaint is irrelevant and immaterial to the issues of this suit.

## V

Answering paragraphs 15 and 16 of the complaint, the Commission denies each of and all the allegations therein contained.

## VI

Answering paragraph 17 of the complaint, the Commission admits that operations beyond the scope of the Commission's final order will, upon and after the effective date of said order, be illegal and might result in the imposition of penalties as prescribed by law.

## VII

Answering paragraph 18 of the complaint, and particularly the first subparagraph thereof, the Commission denies that its order will cause irreparable damage to the plaintiff or any legal damage whatever; and the Commission alleges and shows that under the report and order of the Commission the plaintiff may carry on motor carrier operations to the full extent of those carried on by Globe, plaintiff's predecessor, during the "grandfather" period.

## VIII

Answering the second subparagraph of said paragraph 18 of the complaint, the Commission admits that Globe operated units of equipment as therein stated and that it had built up a large volume of business over various routes as described by the Commission in its report upon reconsideration, but the Commission denies that the plaintiff acquired, or could acquire, from Globe any operating rights beyond those set out and described in the Commission's report on reconsideration, of August 4, 1943, a true copy of which report is attached as Exhibit B to the complaint herein.

41

## IX

Answering the third, fourth, fifth, and sixth subparagraphs of paragraph 18 of the complaint, the Commission alleges and shows that it has no knowledge as to the details of the certificates authorizing common carrier operations held by the plaintiff other than those relating to operating rights purchased from Globe, and the Commission alleges and shows that such operating rights as were

previously held by the plaintiff have no bearing upon the legal duty of the Commission with respect to its action upon the application of Globe, and the Commission denies that such separately acquired rights of the plaintiff are in any way involved in this suit or in the report and order of the Commission on reconsideration, Exhibit B to the complaint herein. The Commission further alleges and shows that in the Commission's order of May 16, 1944, approving the purchase by the plaintiff of the operating rights of Globe Cartage Company, Inc., in proceeding No. MC-F-1743, Hancock Truck Lines Inc.—Purchase—Globe Cartage Company, Inc. (reported 38 M. C. C. 382), the following paragraph appears:

"And it is further ordered; That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein."

Section 5 of the Act, referred to in said order, provides only for the transfer of operating rights; and the Commission further alleges and shows that said paragraph 18 of the complaint and particularly the fourth, fifth and sixth subparagraphs thereof are argumentative and irrelevant to the issues involved in this suit.

## X

Further answering the complaint, the Commission alleges and shows that the plaintiff, as successor to the rights of Globe under its "grandfather" application, on or about November 1, 1943, filed

its petition for reconsideration of the Commission's report  
42 and order on reconsideration of August 4, 1943, and in said

petition the plaintiff limited its objections to said report and order, to the Commission's prescription of the routes over which operating authority was granted therein, expressly waived objection to, and did not challenge or complain against the restriction of the transportation authorized to commodities consigned by freight forwarders and gave up all claim to the right to transport general commodities not so consigned.

## XI

Except as herein expressly admitted, the Commission denies each of and all the allegations of the complaint, especially insofar as they conflict with the allegations of this answer or with the statements, findings, determinations or conclusions set out in the report of the Commission on reconsideration, Exhibit B to the complaint.

All of which matters and things the Commission is ready to aver, maintain and prove, as this Honorable Court shall direct.

Wherefore this defendant prays that the complaint herein be dismissed.

INTERSTATE COMMERCE COMMISSION,  
By (S) NELSON THOMAS,  
Nelson Thomas, *Attorney.*

(S) DANIEL W. KNOWLTON,  
Daniel W. Knowlton,  
*Chief Counsel,  
Of Counsel.*

43 [Duly sworn to by Wm. E. Lee; jurant omitted in printing.]

44 This is to certify that I have mailed a copy of the within answer on behalf of the Interstate Commerce Commission to Robert L. Pierce, Esq., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., B. Howard Caughran, Esq., United States Attorney, Indianapolis 4, Ind., and Albert Ward, Esq., 318 Insurance Bldg., Indianapolis, Ind.

(S) NELSON THOMAS,  
Nelson Thomas.

APRIL 4, 1944.

46 : In the District Court of the United States

*Reply to Paragraph X of the answer of Interstate Commerce Commission*

Filed April 8, 1944

Comes now the plaintiff and denies that part of Paragraph X of the Answer of the Interstate Commerce Commission which avers that the plaintiff gave up all claim to the right to transport general commodities not consigned by freight forwarders; plaintiff further denies that, it has waived its right to present to a court its claim that that part of the order which is complained of in the complaint herein is arbitrary, discriminatory, capricious, unlawful, unconstitutional and without right in the Commission to prescribe.

Wherefore, plaintiff demands judgment for injunctive relief, as prayed for in its complaint.

JACOB WEISS,  
Jacob Weiss,  
ALBERT WARD,  
Albert Ward,  
FERDINAND BORN,  
Ferdinand Born,  
*Attorneys for Plaintiff;  
Hancock Truck Lines, Inc.*

48 In the District Court of the United States

*Petition for leave to intervene*

Filed April 8, 1944

Comes now the Regular Common Carrier Conference of the American Trucking Associations, Inc., your Petitioner, a non-profit corporation, duly organized and existing according to law, by and through its attorneys, B. W. La Tourette and G. M. Rebman, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in and become a party to said proceeding, to file exceptions, briefs, replies and to participate fully in said proceeding; the same as if named therein, and to receive all required notices with respect thereto, and for grounds of the proposed intervention says:

1. That it is an association consisting of the regular route common carrier members of the American Trucking Associations, Inc., a non-profit corporation, constituting the national organization of the trucking industry; and that the purpose of this Conference is primarily to protect the interests of the regular route common carrier trucking industry and to further such interests through intelligent cooperation and organization.

2. That many members of the intervenor are common carriers engaged in the transportation of general commodities by motor vehicle in interstate commerce, in whole or in part in the territory in which complainant seeks authority to operate; that said carriers are so operating by virtue of compliance orders of certificates of convenience and necessity, issued by the Interstate Commerce Commission; that any operating authority which may be granted to the complainant herein in the territory sought will place said complainant in competition with and will prejudice the best interests of the members of intervenor.

3. Your petitioner further states that it does not by the filing of this petition, seek to broaden the issues involved in this proceeding.

Wherefore, your petitioner, the Regular Common Carrier Conference of the American Trucking Associations, Inc., prays leave to intervene and be treated as party hereto with the same rights as though named in complainant's petition.

B. W. LA TOURETTE,

G. M. REBMAN,

*Attorneys for Petitioner.*

818 Olive Street, St. Louis, Missouri.

VERIFICATION

STATE OF MISSOURI,

*City of St. Louis, ss.*

G. M. Rebman, being duly sworn, deposes and says: That he is one of the attorneys for intervenor Regular Common Carrier Conference of the American Trucking Associations, Inc.; that he has read the foregoing petition and knows the contents thereof; and that the same are true as stated, excepting as to those matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

G. M. REBMAN.  
G. M. Rebman.

Sworn to and subscribed before me this 7th day of April, 1944.

[SEAL]

LUCILLE RYAN,  
Notary Public.

My commission expires May 1, 1945.

50 (Entry for April 8, 1944, continued)

which said petition is granted and the Regular Common Carrier Conference of the American Trucking Associations, Inc. is given leave to intervene as a party herein.

This cause is now submitted to a regularly constituted Court comprised of three judges as required under Section 47 of Title 28 U. S. C. upon the plaintiff's application for a permanent injunction. The evidence being heard and concluded, the plaintiff is given to and including April 18, 1944, and the defendants are given to and including April 25, 1944 within which to file their respective briefs and submit drafts of special findings of fact.

Oral argument of counsel will be heard on Friday, April 28, 1944 at 10:00 A. M.

52 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Proposed findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission*

April 26, 1944

The above-styled cause came on for final hearing before this duly constituted three-judge court on April 28, 1944, and was submitted for final decree upon the pleadings, the evidence, the argu-



ments and briefs of counsel for the respective parties. The Court makes and enters its findings of fact and conclusions of law as follows:

#### FINDINGS OF FACT

1. On or about February 4, 1936, Globe Cartage Company, Inc., an Indiana corporation (hereinafter called the Globe), the predecessor of the plaintiff herein, filed its application with the Interstate Commerce Commission (hereinafter called the Commission) under section 206 (a) of the Motor Carrier Act (306 (a) of Title 49, U. S. C. A.) for a "grandfather" certificate authorizing operations as a common carrier by motor vehicle in interstate or foreign commerce of general commodities, except commodities in bulk and those of unusual length, height or weight, between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, and West Virginia, over regular routes described in Appendix A to said application, serving all intermediate points. Upon said application the Commission instituted a proceeding designated No. MC-3339, Globe Cartage Company Inc. Common Carrier Application. Protests were filed by competing carriers by railroad and motor vehicle objecting to the issuance of the certificate prayed.

2. The proceeding was referred to a Commission examiner for the receiving and recording of evidence and the making of a proposed report. Evidence was received on behalf of the applicant and the protestants. A recommended report was prepared by the examiner and served upon all parties to the proceeding. Exceptions were filed and the evidence, the recommended report and the exceptions thereto were submitted to Division 5 of the Commission which, on October 7, 1942, made its report (41 M. C. C. 313) wherein it found, among other things, that the applicant, on June 1, 1935 and continuously thereafter, had been engaged in the transportation of freight between points designated therein solely for the Universal Carloading and Distributing Company, a freight forwarder as defined in section 402 (a) (5) of part IV of the Interstate Commerce Act, under written contracts.

3. The Division further ordered the issuance of a "grandfather" certificate to Globe as a common carrier authorizing the carriage of general commodities between the points designated in said report and overruled the contention of certain protestants that the authority granted should be limited to common carrier service for said Carloading Company. For a full and complete knowledge of the Division's findings, conclusions and orders, reference is made to the report of the Division, 41 M. C. C. 313.

4. Upon petition of protestants the entire Commission reopened and reconsidered the record in said proceeding,

and the action, report and order of Division 5 aforesaid, and on August 4, 1943, made and entered its report on reconsideration (42 M. G. C. 547) in which it found that although the applicant during the "grandfather" period transported only traffic assembled by the Universal Carloading and Distributing Company, the applicant performed a common carrier service and was a common carrier of traffic assembled by freight forwarders; and the entire Commission ordered the issuance of a certificate authorizing operations by the applicant between points therein designated, as a common carrier of general commodities (except commodities in bulk and those of unusual length, height or weight), which are at the time moving on bills of lading of freight forwarders. For a full and complete knowledge of the findings, conclusions and orders of the Commission on reconsideration, reference is made to said report (42 M. G. C. 547).

5. In the course of the proceedings above described, the Globe, the original applicant, sold its rights under the application to Hancock Truck Lines, Inc., plaintiff in this suit, and the Commission, by formal order in proceeding designated MC-F-1743, Hancock Truck Lines, Inc.—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 383, approved of said sale of said rights, subject to final determination as to the extent thereof.

6. On November 1, 1943, plaintiff Hancock Truck Lines, Inc., as successor to the Globe, filed its petition for reconsideration by the entire Commission of its report and order of August 4, 1943, that in said petition the sole error alleged against the Commission was that it granted authority for operation only as to a portion of the routes and between some of the points and places specified in the application. In said petition the plaintiff further stated that it did not challenge nor complain against the restriction of the service authorized to the transportation of commodities which are moving on bills of lading of freight forwarders.

7. On January 10, 1944, the Commission by order denied plaintiff's petition for reconsideration and has from time to time subsequent thereto extended the effective date of its order of August 4, 1943, until May 31, 1944.

8. The plaintiff in this suit does not complain of the Commission's failing to authorize service over all routes or to all points and places specified in the original application of the Globe, nor does it question the correctness of the statements of fact found in the report of Division 5 of the Commission of October 7, 1943, nor in the report of the Commission on further hearing of August 4, 1943; the evidence heard by the Commission has not been put in evidence in this case and hence the findings of fact in the Commission's

reports must, for the purposes of this suit, be taken as supported by substantial evidence.

9. The statements of fact and the findings and conclusions of the Commission, as set out in said report on reconsideration are sufficient to support the Commission's order.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction of this suit to set aside an order of the Interstate Commerce Commission and of the parties thereto.

2. The proceedings before the Commission which resulted in said report and order of the Commission upon reconsideration were within the lawful jurisdiction of the Commission, were made after due notice to all interested parties, a fair hearing, and upon substantial evidence.

3. The limitation of the commodities which the plaintiff is authorized to carry, to those which are moving on bills of lading of freight forwarders, was and is warranted by the law and the facts shown by the Commission's record.

4. The report and order of the Commission and the enforcement thereof will not deprive the plaintiff of any constitutional or legal right.

5. The plaintiff is not entitled to the relief it prays, and this suit should be dismissed for want of equity.

*United States Circuit Judge.*

*United States District Judge.*

*United States District Judge.*

57 And afterwards to wit at the November Term of said Court on the 28th day of April 1944, before the Honorables Sherman Minton, Circuit Judge and Robert C. Baltzell and Luther M. Swygert, District Judges, the following further proceedings were had herein, to wit:

Come now the Indianapolis & Southern Motor Express, Inc. and Adkins Transfer Company, Inc. by their attorney, Claude H. Anderson, and file appearance, which appearance is as follows:

58 United States District Court

The undersigned, having been duly admitted to practice in the said Court, hereby enter

*Appearance*

Indianapolis & Southern Motor Express, Inc., Adkins Transfer Co., Inc., in the above-entitled cause.

(S) CLAUDE H. ANDERSON,  
*Attorney.*

Address: 601 Illinois Bldg., Indianapolis.

59 (Further entry for April 28, 1944)

Come now the parties by their respective attorneys and oral argument of counsel is heard and the Court now takes this cause under advisement.

60 And afterwards to wit at the May Term of said Court on the 25th day of May 1944, before the Honorable Sherman Minton, Circuit Judge, and Robert C. Baltzell and Luther M. Swygert, District Judges, the following further proceedings were had herein, to wit:

This cause coming on now to be finally heard by the Court, and the parties appearing by their respective attorneys, and the Court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

61 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Findings of fact and conclusions of law*

Filed May 25, 1944

The three-judge Court herein having heretofore heard the evidence, the argument of counsel, and being duly advised in the premises, now finds the facts specially herein, and states separately its conclusions of law thereon.

The facts are found to be as follows:

62 Finding No. 1

The plaintiff is a corporation duly organized and existing under the laws of the State of Indiana, and has been such since 1933.

with its principal office and place of business in the City of Evansville, Vanderburgh County, Indiana, and with an office in the City of Indianapolis, in Marion County, Indiana, and is a citizen and resident of the District-Court, for the Southern District of Indiana.

### Finding No. 2

Plaintiff seeks to enjoin, set aside, annul and restrain the enforcement of part of a certain order of the Interstate Commerce Commission, being Order No. MC-3339, entitled Globe Cartage Company, Inc., Common Carrier Application, which was approved on the 4th day of August, 1943 and later modified to become effective on the 31st day of March, 1944, and which proceeding is now designated by the Commission as No. MC-25567 (Sub. No. 8), Hancock Truck Lines, Inc., successor to Globe Cartage Company, Inc.; its action arises under the Fifth Amendment to the Constitution of the United States; and under Section 205 (h) of the Motor Carrier Act of 1935, now Section 205 (g) of Part II of the Interstate Commerce Act, (U. S. Code, Sup. 1, Title 49, Sec. 305 (h), and under the Acts of Congress, Code of Laws of the United States, Title 28, Sections 41 (28), 32 to 48, inclusive.

### Finding No. 3

Throughout the period of plaintiff's corporate existence, it has been, and is now, a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign commerce of general commodities, with certain usual exceptions, for compensation, and has been, and is now, the holder of certain certificates of public convenience and necessity issued to it by the defendant, Interstate Commerce Commission, different from the certificate and order of the Commission complained of in the complaint.

### Finding No. 4

On or about the 29th day of January, 1936, an Indiana corporation known as Globe Cartage Company, Inc., having its general office and principal place of business in Indianapolis, Marion County, Indiana, filed its written application with the defendant, Interstate Commerce Commission, under the grandfather clause or Section 306, Title 49 U. S. C. A., duly alleging that it was in fact, in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory for which such application was made by it, and had so operated since that time down to the filing of its said application, such ap-



plication and proceeding being entitled "Globe Cartage Company, Inc., Common Carrier Application," and bearing No. MC-3339, and wherein it requested said Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by said corporation to the Commission in all respects as provided for in Paragraph (b) of Section 206, of Part II of the Interstate Commerce Act aforesaid, and within 120 days after October 1, 1935; proceedings were had in relation to such application which resulted in a reference of said application to an examiner by said Commission; thereafter, evidence 64 was heard by said Examiner, report was made to the Commission, and under date of October 7, 1942, Division 5 of the defendant, Interstate Commerce Commission, decided that said applicant was entitled to continue operations as a common carrier by motor vehicle of general commodities between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio and Pennsylvania, over regular routes by reason of having been so engaged on June 1, 1935, and continuously since, a copy of the findings of fact, and the decision of said Division 5, dated October 7, 1942, aforesaid, being filed with the complaint, marked "Exhibit A", and made a part thereof, which Exhibit is adopted as a part of these findings.

#### Finding No. 5

Said Division No. 5 of the Interstate Commerce Commission made and adopted its special findings of fact, wherein, among other things, it was found by said Division 5 that on June 1, 1935, said Globe Cartage Company, Inc., was, and continuously since had been, in bona fide operation as a common carrier by motor vehicle, in interstate and foreign commerce, over certain of the routes described in said application, particularly described in paragraph 6 of plaintiff's complaint.

#### Finding No. 6

Said Division No. 5 further found in said findings of fact that it could not, consistently with said applicant's common carrier status, restrict its services to particular shippers, namely, freight forwarders, and that to restrict the traffic which it might transport to shipments made by freight forwarders would, in effect and result, be a restriction of applicant's services to such forwarders.

65

#### Finding No. 7

Said Division 5 thereupon found and concluded that upon compliance by applicant with the requirements of Sections 215 and 217

of said Act, and of the Rules and Regulation of said Commission thereunder, that an appropriate certificate in conformity with such findings would be issued to it, all as is more particularly set out in said Exhibit A aforesaid, in Appendix B thereof.

#### Finding No. 8

Thereafter, further proceedings were had in relation to said application, and the defendant, Interstate Commerce Commission, upon petitions filed by protestants for reconsideration of such findings and conclusions, vacated and set aside the order entered by Division 5, and upon such reconsideration the Commission entered its report and order showing the same to have been decided as of August 4, 1943, and a copy of the Commission's findings, conclusions and order of August 4, 1943, is attached to the complaint, marked "Exhibit B", and made a part thereof, which Exhibit is adopted as a part of these findings.

#### Finding No. 9

The Commission in all respects confirmed the findings of fact of said Division No. 5 to the effect that said applicant, Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e., freight and commodities of every class, type and character), except commodities in bulk and those of unusual length, height or weight; it further found 66 as a fact that said applicant was a common carrier by motor vehicle, and further confirmed and ratified the finding of Division 5 that the Commission could not, consistently with applicant's common carrier status, restrict its services to particular shippers; said Commission further found as a fact that said applicant, Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that said Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier.

#### Finding No. 10

That contrary to the findings above set forth, the Commission did place certain restrictions in said order of August 4, 1943, limiting the transportation to be performed in the future by the plaintiff to those general commodities which are at the time moving on bills of lading of freight forwarders, and specific reference is

made to Sheet 5 of Exhibit B, from which the following is set forth:

"On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk and those of unusual length, height or weight) which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports."

#### Finding No. 11

A petition to modify the effective date of said order was filed, and on February 21, 1944, the Commission made the effective date thereof March 31, 1944, and then by order dated the 13th day of March, 1944, denied the petition to modify the effective date of said order beyond March 31, 1944, and said order was a final order when this action was commenced.

67

#### Finding No. 12

While said proceedings of Globe Cartage Company, Inc., were pending before said Commission in said Cause No. MC-3339, plaintiff acquired all of the common carrier operating rights of the said Globe Cartage Company, Inc., and that such transaction was with the Commission's approval by formal report and order, dated as of May 16, 1942, in proceeding (docket) numbered MC-F 1743, and such operating rights were duly and legally acquired by, and transferred to this plaintiff, Hancock Truck Lines, Inc., and it is now the successor in interest of all the rights of said Globe Cartage Company, Inc., and ever since the consummation of the transaction shortly after the last named date, plaintiff has been, and is now, the sole owner of all of said rights of Globe Cartage Company, Inc., and of all rights, privileges and grants to which Globe Cartage Company, Inc., would have been entitled to, under and pursuant to the proceedings in its said application for said certificate in Cause No. MC-3339 aforesaid, and plaintiff is therefore now interested in said proceeding, and in said final order, and will be the sole owner of such certificate as is issued thereunder.

Exhibit F in evidence is a correct copy of the findings of fact, report and order of the Commission of May 16, 1942, aforesaid, and such Exhibit is adopted as a part of these findings.

#### Finding No. 13

The defendants, and each thereof, is threatening to enforce that part of the order thus complained of in the complaint, and unless they are enjoined by this Court they will enforce said order;

plaintiff has exhausted all of its remedies before the defendant, Interstate Commerce Commission.

68

## Finding No. 14

The plaintiff, as such common carrier of property by motor vehicles, has, and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and enforced just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate and foreign commerce, and has fully complied with all the rules and regulations of the Commission in relation thereto insofar as they are in effect at this time; and as such common carrier it is prohibited by law from making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district territory, or description of traffic, in any respect whatsoever, and as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates.

69

## Finding No. 15

The order of the Commission dated May 16, 1942, referred to in Finding No. 12, was made in said proceeding so numbered M. C. F. 1743, pursuant to a joint application filed before the Commission by Hancock Truck Lines, Incorporated, and Globe Cartage Company, for purchase by the former of the operating rights of the latter; a hearing was had by Division 4 and a finding made by the Commission authorizing such purchase; when the application was filed, Hancock had only paid Globe \$100, but had agreed to pay an additional \$2,500 upon approval of such transaction by the Commission, \$2,500 upon final approval by the last concerned State regulatory authorities, and \$4,900 within 10 days thereafter. The Commission found that approximately 65% of Globe's traffic consisted of business handled for Universal Carloading and Distributing Company, a freight forwarding company, and as a result of handling such business the flow of traffic for Globe was unbalanced, necessitating the dead-



heading of equipment, especially from St. Louis east; it found, on the other hand, that Hancock enjoyed heavier traffic east out of St. Louis than in the reverse direction; the Commission found that, with some exceptions not material herein, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive; both carriers were found to be serving Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points; Globe did not believe that it would be justified in expending additional funds to develop a better balanced operation and, as its functions and facilities substantially duplicated those of Hancock, the desired result could be accomplished through the unification of the operations of Hancock; The Commission found that such unification would result in better balanced lading between the common points served, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes; Hancock was found to have the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing or purchasing the same; the Commission found that savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually, approximately \$20,000 of which represented the estimated cost to Globe, if it remained in operation in developing additional business to balance its present lading; the Commission found that the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation.

The Commission further found that the purchase of Hancock of the common carrier operating rights of Globe, upon the terms and conditions set out in the order, which terms and conditions were found by the Commission to be just and reasonable, was a transaction within the scope of Section 5 (2) (a) and would be consistent with the public interest and pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should conduct the common carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and Hancock would be entitled to a certificate covering any "grandfather" common carrier rights which might be



confirmed as a result of those applications, which rights the Commission by its said order of May 16, 1942, authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; an order was thereupon entered by the Commission conforming to such findings, and such order is in plaintiff's Exhibit F.

71

## Finding No. 16

Following the findings and order of the Commission set out in Finding No. 15, Hancock Truck Lines, Incorporated, in reliance upon such findings and order, paid to Globe said \$9,900, the balance of the purchase price for such common carrier operating rights.

## Finding No. 17

In further reliance upon said findings and order of May 16, 1942, the plaintiff completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as a result of its grandfather applications aforesaid, with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission over the routes aforesaid; plaintiff thereafter continued to operate under said order of unification, and unified the common carrier rights of both of said companies are authorized by the Commission, and has continued such unified operation up to this time, to the extent and in the manner as set out in paragraph 18 of its complaint.

## Finding No. 18

If that part of the order complained of by the plaintiff is enforced, all of the business which plaintiff has built up under said unification order of May 16, 1942, will be destroyed, and plaintiff will be put back to the position which Globe was in when said order was entered, namely, maintaining duplications in terminals and facilities, handling an unbalanced loading, dead-heading of equipment, its savings in excess of \$50,000 per year through consolidation of overlapping functions, including terminal and pick-up delivery facilities, reduction in truck miles operated, and the use of vehicles operated by transporting heavier loads, will all be lost to it, and it will suffer and sustain immediate and irreparable injury, loss and damage on account of the enforcement of the part of said order complained of herein.

72

## Finding No. 19.

The Commission has made no finding of fact that the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it will be consistent with the public interest to place such restriction in said order; nor has it found that good cause exists for changing said order of May 16, 1942.

That part of the order complained of herein is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support; said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void.

DATED at Indianapolis, Indiana, this 25th day of May 1944.

(S) SHERMAN MINTON,  
*Circuit Judge.*

(S) ROBERT C. BALTZELL,  
*District Judge.*

(S) LUTHER M. SWYGERT,  
*District Judge.*

## CONCLUSIONS OF LAW.

Upon the foregoing facts, the Court concludes the law to be as follows:

One. The Court has jurisdiction of the subject matter, and of the parties, in this cause of action.

Two. That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those "which are at the time moving on bills of lading of freight forwarders" is illegal and void, and the defendants should be permanently enjoined from enforcing the same.

Dated at Indianapolis, Indiana, this 25 day of May, 1944.

SHERMAN MINTON,  
*Circuit Judge.*

ROBERT C. BALTZELL,  
*District Judge.*

LUTHER M. SWYGERT,  
*District Judge.*

Decree

May 25, 1944

Upon the foregoing Special Findings of Fact and Conclusions of Law, it is ordered, adjudged, and decreed:

1. That part of the order made and entered by the defendant, Interstate Commerce Commission, as of August 4, 1943, in Cause No. MC-3339, Globe Cartage Company, Inc., Common Carrier Application, complained of in the complaint, which confines authorized operations by Hancock Truck Lines, Inc., successor in interest of Globe Cartage Company, Inc., as a common carrier of general commodities, to general commodities "which are at the time moving on bills of lading of freight forwarders," is illegal and void, and the defendants, United States and The Interstate Commerce Commission, and their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, should be, and they are hereby permanently enjoined and prohibited from enforcing or attempting to enforce the same in any manner.

76 In the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Civil Action No. 795

HANCOCK TRUCK LINES, INC., *Plaintiff*,

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,  
*Defendants*

*Petition for Appeal*

Filed July 22, 1944

The United States and the Interstate Commerce Commission, defendants in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, entered in said court on May 25, 1944, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly

authenticated, be transmitted forthwith to the Supreme Court of the United States.

CHARLES FAHY,  
Charles Fahy,  
*Solicitor General.*

WENDELL BERGE,  
Wendell Berge,  
*Assistant Attorney General.*

ROBERT L. PIERCE,  
Robert L. Pierce,  
EDWARD DUMBAULD,  
Edward Dumbauld,

*Special Assistants to the Attorney General.*

DANIEL W. KNOWLTON,  
Daniel W. Knowlton,  
*Chief Counsel,*

NELSON THOMAS,  
Nelson Thomas,

*Attorney,  
Interstate Commerce Commission.*

79 In the District Court of the United States for the Southern  
District of Indiana, Indianapolis Division:

Civil Action-No. 795

HANCOCK TRUCK LINES, INC., PLAINTIFF

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COM-  
MISSION, DEFENDANTS

*Assignment of errors*

Filed July 22, 1944

Come now, the United States and the Interstate Commerce Com-  
mission, defendants in the above-entitled cause, and file the follow-  
ing assignment of errors upon which they will rely in the prose-  
cution of their appeal from the final decree of the District Court  
entered May 25, 1944. The District Court erred:

1. In not dismissing plaintiff's complaint.
2. In setting aside and denying the Commission's order of  
August 4, 1943.
3. In making and entering findings of fact and conclusions of  
law in the form and substance adopted by the Court.
4. In refusing to adopt the findings of fact and conclusions of  
law submitted by the defendants.



5: In making and entering its order of injunction dated May 26, 1944, holding that that part of the Commission's order which confines authorized operations by Hancock Truck Lines, Inc., as successor in interest of Globe Cartage Company, Inc., to commodities "which are at the time moving on bills of lading  
80 of freight forwarders" is illegal and void, and enjoining enforcement of the same.

6. In holding, as indicated in the Court's finding of fact No. 19, that the report and order of the Commission as issued August 4, 1943, are not supported by the facts found in said report; that said order is discriminatory against the plaintiff; or that it in any way unlawfully restricts plaintiff in the performance of its public duties.

7. In failing to find that the evidence supports the Commission's findings that during the "grandfather" period the Globe Cartage Company, Inc., served only a freight forwarder and carried only goods which were moving on bills of lading issued by a forwarder.

8. In giving consideration as the basis of its decree of May 25, 1944, to the history and characteristics of the plaintiff, Hancock Truck Lines, Inc., and its operations, and to the statements and conclusions of Division 5 in its report of May 16, 1942, in MC-F-1743, approving the purchase of the Globe by the Hancock, as indicated in the Court's findings of fact as a whole, and particularly in findings Nos. 3, 14, 15, 16, 17, and 18.

9. In holding, as indicated by the Court's finding of fact No. 19, that the Commission's order imposed a limitation which could not be sustained in the absence of a finding by the Commission under Section 208 of the Interstate Commerce Act that such limitation was a reasonable limitation required by the public convenience and necessity.

10. In failing to hold that the Commission's order as issued was authorized under that portion of Section 208 of the Interstate Commerce Act which requires the Commission to "specify the service to be rendered" in a certificate issued under Section 206 of that Act.

11. In holding, contrary to the Commission's decision, that the restriction imposed by the Commission was inconsistent  
81 with Globe's common carrier status.

12. In failing to hold that the Commission was authorized to issue a certificate to a common carrier limited, in accordance with Section 203 (14), to the transportation of a particular class of property, viz. property moving on bills of lading of freight forwarders, that being the only class of commodities which the Commission found was being transported by applicant during the "grandfather" period.

13. In weighing the evidence heard by the Commission and making statements of fact in its findings of fact based thereon,



instead of limiting its consideration to the question of whether the Commission record contains substantial evidence to sustain the Commission's report and order.

14. In attempting to permit the plaintiff to exercise operating authority other than that issued by the Commission,—authority which would authorize the plaintiff, as successor to the Globe, to perform operations different from those the Commission has found that the Globe was performing on and subsequent to June 1, 1935, the "grandfather" date.

15. In setting aside only the commodity restriction while leaving the rest of the order in effect, and thereby undertaking to exercise the administrative function entrusted to the Commission of determining in the first instance the scope of the operating authority to be issued; instead of setting aside the order as a whole and remanding the case to the Commission for further proceedings, which would have been the proper procedure in case the commodity restriction contained in the order were held to be invalid.

16. In failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree.

82 17. In making the Court's finding of fact No. 2, which states, among other things, that plaintiff's action arose under the Fifth Amendment to the Constitution of the United States.

Wherefore, Defendants pray that said decree be reversed.

CHARLES FAHY,

Charles Fahy,

*Solicitor General.*

WENDELL BERGE,

Wendell Berge,

*Assistant Attorney General.*

ROBERT L. PIERCE,

Robert L. Pierce,

EDWARD DUMBAULD,

Edward Dumbauld,

*Special Assistants to the Attorney General.*

DANIEL W. KNOWLTON,

Daniel W. Knowlton,

*Chief Counsel,*

*Interstate Commerce Commission.*

NELSON THOMAS,

Nelson Thomas,

*Attorney,*

*Interstate Commerce Commission.*

In United States District Court

*Order allowing appeal*

July 22, 1944

In the above-entitled cause, United States and the Interstate Commerce Commission, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered on May 25, 1944, and having also made and filed an Assignment of Errors and a Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered and decreed, That the appeal be, and the same is hereby, allowed as prayed for.

Said defendants also file citation on appeal, which is as follows:

106 [Citation in usual form, filed July 22, 1944, omitted in printing.]

112 In the District Court of the United States

[Title omitted.]

*Notice of appeal*

Filed July 22, 1944

To the Attorney General for the State of Indiana:

You are hereby notified that the District Court of the United States for the Southern District of Indiana, Indianapolis Division, on July 22, 1944, filed and entered an order allowing an appeal by the United States and the Interstate Commerce Commission to the Supreme Court of the United States from a decree filed and entered on May 25, 1944, in the above-entitled cause, and that the citation signed by such Court on July 22, 1944, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

113 This notice is given to you pursuant to the provisions of  
U-S. Code, Title 28, Sec. 47a, enacted March 3, 1911, c. 231,  
Sec. 210.

Dated, 21st July 1944.

CHARLES FAHY,  
Charles Fahy,  
*Solicitor General.*

WENDELL BERGE,  
Wendell Berge,  
*Assistant Attorney General.*

ROBERT L. PIERCE,  
Robert L. Pierce,  
EDWARD DUMBAULD,  
Edward Dumbauld,  
*Special Assistants to the  
Attorney General.*

DANIEL W. KNOWLTON,  
Daniel W. Knowlton,  
*Chief Counsel.*

NELSON THOMAS,  
Nelson Thomas,  
*Attorney,  
Interstate Commerce Commission.*

Received a copy of the foregoing notice this 22nd day of July  
1944.

JAMES A. EMMERT,  
FRANK HAMILTON,  
*1st Deputy for the Attorney General,  
of the State of Indiana.*

119 In the District Court of the United States

[Title omitted.]

*Præcipe for Transcript of Record.*

Filed July 22, 1944

To the CLERK OF THE ABOVE-NAMED COURT:

You will please prepare a transcript of the record in the above-  
entitled cause to be transmitted to the Clerk of the Supreme Court

of the United States pursuant to the appeal heretofore taken, and include in said transcript the following:

1. Plaintiff's complaint, with Exhibits A, B, C, and D, thereto.
2. Answer of defendant United States.
3. Answer of defendant Interstate Commerce Commission.
4. Plaintiff's reply to paragraph X of answer of defendant Interstate Commerce Commission.
5. Order convening a three-judge court.
6. Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., for leave to intervene and become a party defendant in the above-styled proceeding.
7. Order of April 8, 1944, allowing the above-mentioned intervention, the recording of the filing of plaintiff's reply to paragraph X of the answer of the Interstate Commerce Commission, and the hearing and submission of the case.
8. Proposed findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission (but refused and not given by the court).
9. Findings of fact and conclusions of law submitted by plaintiff and given by the court.
10. Final decree of May 25, 1944.
11. All minute entries and orders entered by the court in said proceeding which have not been hereinabove specifically called for.
12. All exhibits offered at the hearing by plaintiff and admitted in evidence by the court.
13. All exhibits offered by defendants and admitted in evidence by the court.
14. Petition of defendants United States and Interstate Commerce Commission for appeal and any other petition for appeal which may be filed herein.
15. Assignment of errors filed by defendants United States and Interstate Commerce Commission and any other assignment of errors which may be filed herein.
16. Statement as to jurisdiction submitted by defendants United States and Interstate Commerce Commission and any other jurisdictional statement which may be submitted herein.
17. Order allowing appeal.
18. Notice (pursuant to Rule 12 of the Supreme Court) and proof of service thereof.
19. Citation on appeal and proof of service thereof.
20. Notice to the Attorney General of the State of Indiana and proof of service thereof.

- 121 21. This praecipe and any other supplemental praecipe or counter-praecipe which may be filed herein.  
22. The Clerk's certificate.

CHARLES FAHY,  
Charles Fahy,  
*Solicitor General.*

WENDELL BERGE,  
Wendell Berge,  
*Assistant Attorney General.*

ROBERT L. PIERCE,  
Robert L. Pierce,  
EDWARD DUMBAULD,  
Edward Dumbauld,  
*Special Assistants to the Attorney General.*

DANIEL W. KNOWLTON,  
Daniel W. Knowlton,  
*Chief Counsel.*

NELSON THOMAS,  
Nelson Thomas,  
*Attorney,*  
*Interstate Commerce Commission.*

- 122 Receipt of copy of the foregoing Praecipe for Transcript of Record acknowledged this July 22, 1944.

JACOB WEISS,  
ALBERT WARD,  
FERDINAND BORN,  
*Attorneys for Hancock Truck Lines, Inc.*

- 127 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Petition for appeal*

Filed July 22, 1944

The Regular Common Carriers Conference of the American Trucking Association, Inc., a corporation, the intervening defendant in the above-entitled cause, feeling itself aggrieved by the final decree of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, entered in said court on May 25, 1944, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein it considers the decree erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.



Said defendant prays that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

B. W. LA TOURETTE,

B. W. La Tourette,

G. M. REBMAN,

G. M. Rebman,

818 Olive Street, St. Louis (1), Mo.

Attorneys for Intervening Defendant.

HOWELL ELLIS,

Howell Ellis,

520 Illinois Building, Indianapolis, Indiana,

Local Counsel for Intervening Defendant.

129

In the District Court of the United States

*Assignment of errors*

Filed July 22, 1944

Come now the Regular Common Carrier Conference of the American Trucking Associations, Inc., defendant, intervenor in the above-entitled cause, and files the following assignment of errors upon which they will rely in the prosecution of their appeal from the final decree of the District Court entered May 25, 1944. The District Court erred:

1. In not dismissing plaintiff's complaint.
2. In setting aside and enjoining the Commission's order of August 4, 1943.
3. In making and entering findings of fact and conclusion of law in the form and substance adopted by the Court.
4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants.
5. In making and entering its order of injunction dated May 26, 1944, holding that that part of the Commission's order which confines authorized operations by Hancock Truck Lines, Inc., as successor in interest of Globe Cartage Company, Inc., to commodities "which are at the time moving on bills of lading of freight forwarders" is illegal and void, and enjoining enforcement of the same.

130 6. In holding, as indicated in the Court's finding of fact No. 19, that the report and order of the Commission as issued August 4, 1943 are not supported by the facts found in said report; that said order is discriminatory against the plaintiff; or

that it in any way unlawfully restricts plaintiff in the performance of its public duties.

7. In failing to find that the evidence supports the Commission's findings that during the "grandfather" period the Globe Cartage Company, Inc., served only a freight forwarder and carried only goods which were moving on bills of lading issued by a forwarder.

8. In giving consideration as the basis of its decree of May 25, 1944, to the history and characteristics of the plaintiff, Hancock Truck Lines, Inc., and its operations, and to the statements and conclusions of Division 5 in its report of May 16, 1942, in MC-F-1743, approving the purchase of the Globe by the Hancock, as indicated in the Court's findings of fact as a whole, and particularly in findings Nos. 3, 14, 15, 16, 17, and 18.

9. In holding, as indicated by the Court's finding of fact No. 19, that the Commission's order imposed a limitation which could not be sustained in the absence of a finding by the Commission under Section 208 of the Interstate Commerce Act that such limitation was a reasonable limitation required by the public convenience and necessity.

10. In failing to hold that the Commission's order as issued was authorized under that portion of Section 208 of the Interstate Commerce Act which requires the Commission to "specify the service to be rendered" in a certificate issued under Section 206 of that Act.

11. In holding, contrary to the Commission's decision, that the restriction imposed by the Commission was inconsistent with Globe's common carrier status.

12. In failing to hold that the Commission was authorized to issue a certificate to a common carrier limited, in accordance with Section 203 (14), to the transportation of a particular class of property, viz, property moving on bills of lading of freight forwarders, that being the only class of commodities which the Commission found was being transported by applicant during the "grandfather" period.

13. In weighing the evidence heard by the Commission and making statements of fact in its findings of fact based thereon, instead of limiting its consideration to the question of whether the Commission record contains substantial evidence to sustain the Commission's report and order.

14. In attempting to permit the plaintiff to exercise operating authority other than that issued by the Commission—authority which would authorize the plaintiff, as successor to the Globe, to perform operations different from those the Commission has found that the Globe was performing on and subsequent to June 1, 1935, the "grandfather" date.

15. In setting aside only the commodity restriction while leaving the rest of the order in effect, and thereby undertaking to exercise the administrative function entrusted to the Commission of determining in the first instance the scope of the operating authority to be issued; instead of setting aside the order as a whole and remanding the case to the Commission for further proceedings, which would have been the proper procedure in case the commodity restriction contained in the order were held to be invalid.

16. In failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree.

132 17. In making the Court's finding of fact No. 2, which states, among other things, that plaintiff's action arose under the Fifth Amendment to the Constitution of the United States.

Wherefore, Defendants pray that said decree be reversed.

B. W. LATOURETTE,

G. M. REBMAN,

818 Olive Street, St. Louis (1), Mo.

Attorneys for Intervening Defendant.

HOWELL ELLIS,

520 Illinois Building, Indianapolis, Indiana,

Local Counsel for Intervening Defendant.

158

In United States District Court

Order allowing appeal

July 22, 1944

In the above-entitled cause, Regular Common Carrier Conference Associations, Inc., a corporation, having made and files a petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered on May 25, 1944, and having also made and filed an Assignment of Errors and a Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered and decreed, That the appeal be, and the same is hereby, allowed as prayed for.

159 [Citation in usual form, filed July 22, 1944, omitted in printing.]

164

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Notice of appeal*

Filed July 25, 1944

To the ATTORNEY GENERAL FOR THE STATE OF INDIANA:

You are hereby notified that the District Court of the United States for the Southern District of Indiana, Indianapolis Division, on July 22nd, 1944, filed and entered an order allowing an appeal by the Intervening Defendant, Regular Common Carriers Conference Associations, Inc., a corporation, to the Supreme Court of the United States from a decree filed and entered on May 25, 1944, in the above-entitled cause, and that the citation signed by such Court on July 22, 1944, in connection with the order allowing such appeal, is made returnable on August 29, 1944.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendant's jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

165 This notice is given to you pursuant to the provisions of U.S. Code, Title 28, Sec. 47a, enacted March 3, 1911, C. 231, Sec. 210.

Dated July 25, 1944.

(S) B. W. LA TOURETTE,

B. W. La Tourette,

(S) G. M. REHMAN,

G. M. Rehman,

818 Olive Street, St. Louis (1), Mo.,

Attorneys for Intervening Defendant.

(S) HOWELL ELLIS,

Howell Ellis,

520 Illinois Building, Indianapolis, Ind.,

Local Counsel for Intervening Defendant.

Received a copy of the foregoing notice this 25th day of July 1944.

ROBERT HOLLOWELL, JR.,

Deputy Attorney General for the Attorney,

General of the State of Indiana.



210 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Stipulation that original exhibits be transmitted as part of transcript of record on appeal*

Filed Aug. 14, 1944

The parties to the above-styled cause hereby stipulate that the originals of all exhibits introduced or offered in evidence at the hearing of the above-entitled cause before the statutory court may be transmitted as a part of the transcript of record on appeal in this case to the Supreme Court of the United States in lieu of the transmission of copies or transcripts thereof.

This 2d day of August 1944.

EDWARD DUMBAULD,

NELSON THOMAS,

*Attorneys for plaintiff-appellees.*

JACOB WEISS,

ALBERT WARD,

FERDINAND BORN,

*Attorneys for Plaintiff-appellees.*

212 [Cost bond on appeal for \$250.00 approved and filed Aug. 17, 1944, omitted in printing.]

215 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

*Præcipe for transcript of record*

Filed Aug. 17, 1944.

*To the Clerk of the Above-named Court:*

You will please prepare a transcript of the record of the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States pursuant to the appeal heretofore taken, and include in said transcript the following:

1. Plaintiff's complaint, with Exhibits A, B, C, and D thereto.
2. Answer of defendant United States.
3. Answer of defendant Interstate Commerce Commission.



4. Plaintiff's reply to paragraph X of answer of defendant Interstate Commerce Commission.

5. Order convening a three-judge court.

6. Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., for leave to intervene and become a party in the above-styled proceeding.

216 7. Order of April 8, 1944, allowing the above-mentioned intervention, the recording of the filing of plaintiff's reply to paragraph X of the answer of the Interstate Commerce Commission, and the hearing and submission of the case.

8. Proposed findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission (but refused and not given by the court).

9. Findings of fact and conclusions of law submitted by the plaintiff and given by the court.

10. Final decree of May 25, 1944.

11. All minute entries and orders entered by the court in said proceeding which have not been hereinabove specifically called for.

12. All exhibits offered at the hearing by plaintiff and admitted in evidence by the court.

13. All exhibits offered by defendants and admitted in evidence by the court.

14. Petition of defendants United States and Interstate Commerce Commission for appeal and petition of intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc., for appeal.

15. Assignment of errors filed by defendants United States and Interstate Commerce Commission and assignment of errors filed by intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc.

16. Statement as to jurisdiction submitted by defendants United States and Interstate Commerce Commission and by intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc.

17. Orders allowing appeal.

18. Notices pursuant to Rule 12 of the Supreme Court and proof of service thereof.

19. Citations on appeal and proof of service thereof.

217 20. Notices to the Attorney General of the State of Indiana and proof of service thereof.

21. This praecipe and any other supplemental praecipe or counter-praecipe which may be filed herein.

22. The Clerk's certificate.

B. W. LATOURETTE

B. W. LaTourette,

GREGORY M. REBMAN,

Gregory M. Rebman,

818 Olive Street, St. Louis, Mo.

Attorneys for Intervening Defendant.

HOWELL ELLIS,

Howell Ellis,

520 Illinois Building, Indianapolis, Ind.,

Local Counsel for Intervening Defendant.

218 Receipt of copy of the foregoing Praecipe for Transcript of Record acknowledged this 17th day of August 1944.

(S) FERDINAND BORN,

Attorney for Hancock Truck Lines, Inc.

Received a copy of the foregoing praecipe this 17th day of August 1944.

(S) B. HOWARD CAUGHRAN,

United States Attorney.

221 In the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Civil Action No. 795

[File endorsement omitted.]

HANCOCK TRUCK LINES, INC., PLAINTIFF

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,  
DEFENDANTS

Before Hon. Sherman Minton, Hon. Robert C. Baltzell, and Hon. Luther M. Swygert, Judges.

Official reporter's transcript of the evidence given on the hearing,

Indianapolis, April 8, 1944

Filed Aug. 22, 1944

223 Be it remembered, that in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indian-

apolis, Indiana, on Saturday, April 8, 1944, commencing at ten o'clock in the forenoon, the above-entitled cause, being at issue, came on for hearing before the Honorable Sherman Minton, Judge of the Circuit Court of Appeals for the Seventh Circuit, Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, and Honorable Luther M. Swygert, Judge of the District Court of the United States for the Northern District of Indiana, and the evidence given upon the hearing is in the words and figures following, to wit:

*Appearances*

The Plaintiff appeared by Albert Ward, Esq., Jacob Weiss, Esq., and Ferdinand Born, Esq., its attorneys.

The Defendants appeared by B. Howard Caughran, Esq., 224 United States District Attorney in and for the Southern District of Indiana, Nelson Thomas, Esq., attorney for the Interstate Commerce Commission, and Robert L. Pierce, Esq., Special Assistant to the Attorney General of the United States.

The Intervenor, ~~Regent~~ Common Carrier Conference of the American Trucking Associations, Inc., appeared by G. M. Rebinan, Esq., and Brainard W. LaTourette, Esq., its attorneys.

The plaintiff, to maintain the issues on its behalf, offered and introduced the following evidence, to wit:

Mr. WARD. The plaintiff now offers to introduce in evidence Exhibit A, attached to its complaint. Exhibit A attached to the complaint is offered in evidence as a true, correct, and complete 225 copy of the report, findings of fact, conclusions, and order of Division No. 5, which was referred to generally in Paragraphs 5, 6, 7, and 8 of the complaint.

Judge MINTON. Any objection?

Mr. THOMAS. No objection.

Judge MINTON. Show it read.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit A."

226 Mr. WARD. The plaintiff now offers to introduce in Evidence Exhibit B, attached to its complaint, and it is offered as a true, correct, and complete copy of the report, findings of fact, conclusions and order of the full Commission, made upon reconsideration of the order of Division 5 aforesaid, and which is referred to generally in Paragraphs 9, 10, and 11 of the complaint.

Judge MINTON. Any objection?

Mr. THOMAS. No objection.

If the Court please, the Commission, both the Commission and the Government, in their answers, admit the correctness of the copies attached to the complaint.

Judge MINTON. Yes, I understand.

Mr. THOMAS. So that is all settled.

Judge MINTON. It may be admitted.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit B."

227 Mr. WARD. The plaintiff now offers to introduce in evidence its Exhibit C attached to its complaint, and it is offered as a true, correct, and complete copy of the order made by the Commission on February 21, 1944, fixing the effective date of the order, which is complained of in the complaint, as March 31, 1944.

Mr. THOMAS. No objection.

Judge MINTON. It may be admitted.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit C."

228 Mr. WARD. The plaintiff now offers to introduce in evidence its Exhibit D attached to the complaint, which is offered as a true, correct and complete copy of the order made by the Commission on March 13, 1944, denying an extension of time of the effective date of the order complained of beyond March 31, 1944.

Judge MINTON. Any objection?

Mr. THOMAS. No objection.

Judge MINTON. It may be admitted.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit D."

229 Mr. WARD. Now, your Honors, I am in a little dilemma about my next exhibit, which would be Exhibit E and which I now offer as a certified copy of the application of the Globe Cartage Company, Inc., and the amendments thereto, which was filed with the Commission on or about the 26th of January, 1936.

I will have to ask permission to supply that. In some way in lodging our order with the Secretary of the Interstate Commerce Commission, we did not make plain to him that we wanted a certified copy of the petition, although we sent a copy of it to him, but we talked with him this morning and he has assured us that he will have it here early next week.

I have discussed the matter with Mr. Thomas and he has kindly said that the record might show it is offered and then be supplied, I believe, when it gets here. Is that right, Mr. Thomas?

Mr. THOMAS. That is very satisfactory.

Judge MINTON. Is that satisfactory?

230 Mr. THOMAS. Yes, sir.

Judge MINTON. Let the record show that it is offered at this time and will be supplied later.

Mr. WARD. The application and the amendments?

Mr. THOMAS. Both applications?

Mr. WARD. Yes; I think we might as well have them both.

Mr. THOMAS. The report states that both were filed so that, if you present one, it will be sufficient.

Mr. WARD. We will present the application for common carrier rights.

Mr. WEISS. MC-3339.

Mr. WARD. 3339. The other relates to contract carrier rights, which is out of the issue now.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit E."

231 Mr. WARD. Exhibit F, identified by the Reporter as such, is now offered in evidence by the plaintiff as being a certified copy of the order made by the Commission on May 16, 1942, which authorized the purchase of the operating rights from Globe Cartage Company, Inc., by the plaintiff in this action, wherein it is shown that Major Riddle is connected with the Hancock Truck Lines.

Judge MINTON. There isn't any question about that. It is admitted in the record.

Mr. WARD. I would like to have the order in.

Mr. THOMAS. We have no objection.

Judge MINTON. All right. If there is no objection, it may be admitted.

Mr. WARD. I am offering just the order. Well, now; wait a minute.

Mr. WEISS. The report and the order.

Mr. WARD. The report and the order. They are separate, but they are both certified.

Mr. WEISS. That is the report and order in MC-F-1743.

The said document, so offered and admitted in evidence, marked for identification "Plaintiff's Exhibit F."

232 Mr. WARD. Now, if your Honors please, if I may try to simply this issue a little further probably, with the view of not encumbering this record with the evidence that was heard before the Commission, we have a certified copy of the evidence and, while I suspect our complaint would not justify an argument from us that we are challenging the findings of fact of the Commission, yet we have it here and, if anybody wants it, why, we are willing to put it in, but there are about two questions here that are denied, as to which, if we might have a statement from counsel for defendants, it might eliminate any further evidence.

First, we claim that we will be prejudiced and injured and damaged if this order, which we say is void, is made operative. So I suspect we will probably have to make proof of that orally unless we get some statement from these defendants that will



eliminate it. I don't think there is any question but what we can show that we will be substantially damaged.

I don't know what the position of the defendants will be in that connection, although I have discussed it with them some and they reserved the right to discuss it further.

Mr. PIERCE. If the Court please, we are not questioning the plaintiff's right to bring this suit at all—

Mr. WARD (interposing). No; that doesn't quite reach it.

Mr. PIERCE (continuing). On this question of irreparable injury, so-called.

Judge MINTON. There will be no question, if this order goes into effect, that they will suffer?

Mr. PIERCE. As I understand it, since this is a "grandfather" order, the plaintiffs here actually now do undertake operations to serve the public generally.

Mr. WARD. We do a large volume of business as we allege in our complaint.

Mr. WEISS. And did before the order.

Mr. WARD. Both before the order and now, so that, if that is taken away from us on any particular date, we will suffer irreparable damage.

Mr. PIERCE. And you took that over from the Globe?

234. Mr. WARD. Oh, yes.

Mr. THOMAS. If the Court please, we believe that any operations that they do outside of service to forwarders is done under the pendency clause of Section 206, which provides that, while an application is pending, the carrier may perform the duties, the operations, for which he asks a certificate, so that we do not question the legality of their doing outside business during the pendency of this application, which, in view of the Commission's extension of the effective date, is construed to be still pending.

Judge BALTZELL. You are admitting, are you, that, if this is taken away, it would be taking their business away from them?

Mr. THOMAS. Yes, sir; and we do say that, if the Court should find that this final order of the Commission is invalid and the Commission had no power in the premises to make it, it should be set aside. In other words, I think that takes care of this question of specific monetary damage.

235. Mr. WARD. Well, I don't want to be confronted with a moot question. I want this record to show that we are damaged.

Mr. THOMAS. Neither of us raised that question in our answers.

Mr. WEISS. And you agree, now, that we don't have to submit proof on that?

Mr. THOMAS. If the Court finds that this order of the Commission is void, it should set it aside.

Judge MINTON. All right. Well, then, you don't offer the evidence?

Mr. WARD. I think that will be our conclusion. I would like to discuss it with co-counsel briefly.

Judge MINTON. All right.

Mr. WARD. There is one further allegation in the plaintiff's bill which is not denied nor is it admitted nor do they claim they don't have knowledge. That is that the plaintiff has been operating all of this time as a common carrier and has on file with the Commission its tariffs and regulations and a full showing as to its facilities and so forth for meeting the public demands. They say that is immaterial. In other words, under the rules, that 236 probably might be termed an admission, but I am not so certain about it.

Judge MINTON. If they don't deny it, of course, it would be an admission if it isn't material.

Mr. WARD. Well, I don't know whether it is material or not, but I just wondered what they would have to say about it.

Mr. THOMAS. We allege it is irrelevant.

Mr. WARD. And they don't answer it for that reason.

Mr. THOMAS. The tariff, of course, conforms to the carriers' rights and, of course, the Commission can't confer any legal rights or take away any of the legal rights of the plaintiff or its predecessor here and, therefore, whatever they filed, the tariffs filed could not have any bearing on the issues in this case.

Mr. WARD. I think that is true, your Honors, and, if we are a common carrier, with the facilities of a common carrier, and have our tariffs on file and no complaint has been made of them, I 237 think that is a matter that you could take into consideration in determining the effect of this order. They find we are common carriers.

Judge MINTON. That would be a question of fact, wouldn't it, and that would be settled by the record?

Mr. WARD. Well, that is what I am trying to eliminate; going into all of these tariffs.

Mr. WEISS. They are very voluminous.

Mr. WARD. I think the Commission ought to know.

Judge MINTON. Did the Commission find anything along that line?

Mr. PIERCE. This is a "grandfather" application of the plaintiff's predecessor. Any operation that they may continue under their own rights, previously had, or under their successor's rights, didn't come into the case, as I see it.

Mr. WARD. They are not raising any question on that issue, as I understand it.

Judge MINTON. The tariffs are on file and admitted to be on file for whatever that proves?

Mr. PIERCE. Whose tariffs are these?

Mr. WARD. The Globe Cartage Company tariffs as a common carrier, which were assumed by us when the Commission authorized us to purchase it, and Hancock has its own, of course.

Mr. WEISS. They are their agency tariffs.

Mr. THOMAS. Well, they participate in the tariffs and they are filed by an agent and so they are, in effect, tariffs of the Globe.

Mr. WARD. That is right, assumed by us, and we are bound by them the same as Globe would have been when the Commission authorized us or Major Riddle to take over the operating rights.

Judge MINTON. You don't question that, do you, Mr. Thomas?

Mr. THOMAS. We don't question the Globe's right to have sold to Hancock and Hancock's entitlement to any rights that the Globe had, but we don't think tariffs are relevant to the issues in this case.

Judge MINTON. Anything else?

Mr. WARD. Just a minute. As I understand the rule, the allegations in the answer, which admit certain allegations in the bill, are treated as true by the court in consideration of the case.

238 Is that right? Admission of the allegations of our bill, as contained in their answer, do not have to be proved in the evidence; they are taken by the court as factually true?

Judge MINTON. Yes.

Mr. WARD. Now, your Honors, in order to make this record complete insofar as the orders of the Commission are concerned, some of which may be immaterial in view of the issue, we have asked Secretary Bartel to furnish us with a certified copy of all orders made by the Commission in relation to this particular Order MC-3339. I am not certain that they are material, but, if any party in interest wants them, we will have them here and they may be submitted in evidence, if they want them, at the argument.

Mr. THOMAS. We submit that the record should be made up now and we have no objection to the plaintiff putting in any and all orders of the Commission.

Mr. WARD. All right. Let it be marked as whatever the next exhibit is and we will put it in evidence. That will be our Exhibit G.

The said certified copy of orders, so offered, collectively marked for identification "Plaintiff's Exhibit G," was admitted and read in evidence.

240 Mr. WARD. Now, your Honors, I think I should state that, since the filing of this action, perhaps the next day, a stipulation was entered into between the plaintiff and the defendants whereby the Commission authorized an extension of the effective date of the order from March 31 until May 1st, 1944, and, in con-

sideration of that, we withdrew our application for a restraining order, but we are going to be up to the question of a temporary injunction if some further relief isn't granted to us on May 1st.

Mr. THOMAS. I would rather the record show that that wasn't in the nature of a stipulation. That was an action by the Commission at the request of the Judge—

Mr. WARD (interposing). Oh, no.

Mr. THOMAS (continuing). In order to avoid the necessity of calling in a three-judge court to hear the application for an interlocutory injunction.

Mr. WARD. Why, I thought that was a stipulation.

Mr. THOMAS. The discussion of it is comparatively immaterial. The order has been duly entered and the effective date has been postponed until May 1st.

Judge BALTZELL. I understand the stipulation just shows there was an order entered at that time?

Mr. WARD. That is right.

Mr. THOMAS. Oh, yes; there was one entered. The fact is that we allege in our answer that the order was entered.

Mr. WARD. There is no dispute about it.

Judge MINTON. That ought to bring us up to May 1st and, then, after the argument on the 28th, the Court will dispose of it on that day.

I suppose the Commission would accommodate the Court and grant a further extension of the time on the enforcement of the order if it should be necessary?

Mr. THOMAS. I am confident it would. I have no reason to doubt that, on request of the Court, it would enter another extension.

Mr. WARD. Could you advise us in advance of such an extension, because we would certainly have to make application for it otherwise. We are confronted with this order now.

242 Judge MINTON. Let the record show that the Court asks an extension for thirty days longer in order to have time to consider the briefs.

Mr. THOMAS. I will recommend it to the Commission, your Honor, and when we come out here for the argument, I expect that I will be able to announce to the Court that the extension has been entered.

Judge MINTON. Well, the Commission usually does that, and so we will rather rely on it.

Mr. WARD. It is a courtesy that we would like to have if we could get it in this case.

Judge MINTON. They usually grant those things and there is no reason why they wouldn't here.

Mr. THOMAS. Not at all.



Mr. WARD. We rest, your Honor.

(And the plaintiff here rested.)

243 Whereupon, the defendants, to maintain the issues on their behalf, offered and introduced the following evidence, to wit:

Mr. THOMAS. If the Court please, the Commission offers in evidence certified copies of the file taken from the Commission's records.

As the Defendant Commission's Exhibit No. 1, we offer in evidence the petition of The Cleveland, Columbus & Cincinnati Highway, Incorporated, Motor Express, Incorporated, and several other motor express companies for reconsideration by the Commission of the report of Division 5, dated November 10, 1942, in Docket No. MC-3339 and MC-3340.

Judge MINTON. Any objection?

Mr. WARD. Well, I haven't seen it, your Honor, but I would imagine it is wholly immaterial and would not be binding upon the plaintiff in this action.

244 Mr. THOMAS. The purpose of this and several other petitions which were filed prior to the action of the Commission as of a whole upon reconsideration is to show that this question of the limitation of transportation to operations which are moving under forwarded bills of lading was presented originally to the Division and that the plaintiffs, the applicants, had notice that that was an issue before the Commission.

Mr. WARD. Well, the record already shows that the Division denied that petition and decided against you on it, decided against the Commission on it, and decided that we were entitled to an unlimited certificate.

Mr. THOMAS. If the Court please, it shows the considerations leading up to the final action of the Commission. Of course, I offer it merely as to procedure. I am not offering it as conclusive or anything of that kind, but merely to show the course of the proceeding in that respect.

Judge MINTON. I think it may be admitted.

(The said petition, so offered and admitted in evidence, marked for identification "Defendant Commission's Exhibit No. 1.")

245 Mr. THOMAS. I offer in evidence next as Defendant Commission's Exhibit No. 2 the petition of Railroad Protestants in Central Freight Association Territory for reconsideration of the report and order of the Division.

This document is dated November 21, 1942, and filed in No. MC-3339.

Judge MINTON. Any objection?

Mr. WARD. I don't know why that should be competent here, your Honors. It is a petition by a competitor, asking the Commis-



sion itself to review the order of this Division. Undoubtedly it is by a competitor against our rights.

Mr. THOMAS. The Court will understand that all of these papers were served upon the applicant and it shows that they were charged with knowledge that this question was before the Commission. It certainly shows the course of the proceedings.

Judge MINTON. Do you have any objection?

Mr. WARD. No further objection that I can think of.

246 Judge MINTON. Subject to the objection, it will be admitted.

(The said petition, so offered and admitted in evidence, marked for identification "Defendant Commission's Exhibit No. 2."

247 Mr. THOMAS. I offer, as the Defendant Commission's Exhibit No. 3, the Globe Cartage Company's reply to the petition for reconsideration and for oral argument of protestants, dated November 16, 1942, and filed in both Dockets MC-3339 and 3340.

Judge MINTON. Any objection?

Mr. WARD. No objection.

Mr. WEISS. We are bound by it.

(The said document, so offered, marked for identification "Defendant Commission's Exhibit No. 3," was admitted and read in evidence.)

248 Mr. THOMAS. I offer in evidence, as the Defendant Commission's Exhibit No. 4, the petition of the Regular Common Carrier Conference of the American Trucking Associations, Incorporated, for a reconsideration of the Division's report. This document is dated January 13, 1943, and filed in both MC-3339 and MC-3340.

Mr. WARD. Same objection. You can begin to see how much pressure was brought on Division 5 to change its opinion.

Mr. THOMAS. It didn't succeed with the Division, however.

Judge MINTON. It may be admitted subject to the objection.

(The said petition, so offered and admitted in evidence, marked for identification "Defendant Commission's Exhibit No. 4."

249 Mr. THOMAS. I offer in evidence, as the Defendant Commission's Exhibit No. 5, the reply of the Globe Cartage Company, the applicant, to petitions for leave to intervene and for reconsideration of the Regular Common Carrier Conference of the American Trucking Associations, Incorporated, and it is the last petition that I will have to offer except that of the plaintiff herein.

(The said document, so offered, marked for identification "Defendant Commission's Exhibit No. 5," was admitted and read in evidence.)

250 Mr. THOMAS. I offer in evidence, as the Defendant Commission's Exhibit No. 6, the petition for reconsideration filed by the plaintiff, the Hancock Truck Lines, in both Docket No. MC-3339 and MC-3340, and Docket No. MC-25567, Sub No. 8, which is a low number which was assigned to this matter, dated October 29, 1943.

That, if the Court please, is a petition for reconsideration which was filed after the report and order of the full Commission and in it we find a statement by the plaintiff here that, "We do not challenge, nor do we complain against, the restriction to serve only freight forwarders." We give up our claims to serve others, painful as this limitation is," and it is upon this that we base our contention that the plaintiff here has waived its objection which they now make to the Commission's action.

Mr. WARD. Now, as to that I have a special objection.

The objection is that there is no issue tendered here properly under the rules of waiver on behalf of the plaintiff in this  
251 action as to its right to present this question to this Court, and for the further reason that Paragraph 10 of the answer of the Commission is nothing more nor less than the barest kind of a conclusion of the pleader that there has been a waiver of a certain constitutional or lawful right, with no facts alleged in the answer in support of that conclusion, and for that reason they tender no issue of waiver here; and for the further reason that it certainly comes with ill grace for the Interstate Commerce Commission of the United States to set up a void order and one which they admit, if it is enforced, will confiscate and take the petitioner's property without due process of law in violation of the Fifth Amendment, and it should not be urged as a waiver against anything that the applicant did in connection with his petition for rehearing, where he was trying to retrieve the routings set out in the application.

Mr. THOMAS. If the Court please, as alleged in Paragraph 10 of the Commission's answer, the plaintiff, successor to the rights of the Globe Cartage Company, on or about November 1st,  
252 1943, filed its petition for reconsideration of the Commission's report and order of August 4, 1943—that, of course, is the final report and order—in which petition the plaintiff expressly waived objection to and did not challenge or complain against the restriction of the transportation authorized to commodities consigned by freight forwarders.

Now, if the Court please, I submit that the Commission's interest goes not only to this lawsuit but also the protection of the motor carrier industry generally. Now, this waiver here doubtless prevented regular common motor carriers, whose business would be cut into if, instead of limiting this application to goods

consigned by the forwarders as previously, as was the case during the "grandfather" period, Hancock was entitled, under this authority involved here, to go out and solicit, so that I submit that it is the Commission's duty to raise this point on behalf of the regular common motor carriers, who doubtlessly refrained from opposing this change, as they had done consistently in every other instance.

I submit that it is admissible.

Judge MINTON. It may be admitted subject to the objection.

Mr. WARD. An exception.

(The said document, so offered and admitted in evidence, marked for identification "Defendant Commission's Exhibit No. 6.")

254 Judge MINTON. Anything more?

Mr. THOMAS. That is all on behalf of the defendants.

(And the defendants here rested.)

Mr. WARD. We have no rebuttal.

Judge MINTON. Nothing further?

Mr. WARD. No, sir.

Judge MINTON. All right. We will see you on the 28th of April.

(Whereupon, the hearing was concluded.)

422

*Plaintiff's exhibit F*

## INTERSTATE COMMERCE COMMISSION

No. MC-F-1743

HANCOCK TRUCK LINES, INCORPORATED—PURCHASE—GLOBE CARTAGE COMPANY, INC.

423

No. MC-F-1743

HANCOCK TRUCK LINES, INCORPORATED—PURCHASE—GLOBE CARTAGE COMPANY, INC.

Submitted January 23, 1942. Decided May 16, 1942.

Purchase by Hancock Truck Lines, Incorporated, of operating rights of Globe Cartage Company, Inc., approved and authorized, subject to condition

Ferdinand Born and Jacob Weiss for applicants.

## REPORT OF THE COMMISSION

## DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

## BY DIVISION 4:

Hancock Truck Lines, Incorporated, of Evansville, Ind., and Globe Cartage Company, Inc., of Indianapolis, Ind., herein called Hancock and Globe, respectively, by joint application filed December 23, 1941, seek authority under section 5, Interstate Commerce Act, for purchase by the former of operating rights of the latter for \$10,000. Hearing has been held, at which the parties waived service of an examiner's proposed report.

The corporate history of Hancock, an Indiana corporation, controlled through ownership of 100 percent of its outstanding capital stock by Major A. Riddle, is described in Hancock Truck Lines, Inc.—Purchase—Motor Freight Corp., 5 M. C. C. 405, 15 M. C. C. 435, and 35 M. C. C. 7. Pursuant to findings in Hancock Truck Lines, Inc., Common Carrier Application, 14 M. C. C. 403, an amended certificate was issued to Hancock in No. MC-25567, on June 10, 1940, authorizing operations in interstate or foreign commerce as a motor-vehicle common carrier of general commodities (a) over regular routes, serving specified intermediate and off-route points, between Evansville and Chicago, Ill., via

Vincennes and Terre Haute, Ind., between Evansville and Henderson, Ky., between Evansville and Louisville, Ky., between Vincennes, and St. Louis, Mo., between Terre Haute and Indianapolis, Ind., and between Evansville and Detroit, Mich., via Vincennes, Indianapolis, Fort Wayne, and Angola, Ind., and Coldwater, Mich., restricted to traffic moving to or from Evansville over this route, and (b) over irregular routes, between Chicago, on the one hand, and points and places in a defined area in northeastern Illinois, on the other. Under rights confirmed in No. MC-25567 (Sub-No. 1), it conducts similar regular-route operations between St. Louis and Louisville via Vincennes, and, under a certificate issued in No. MC-25567 (Sub-No. 4), it operates over certain short-cut routes between Evansville and Indianapolis. Hancock utilizes substantially more than 20 motor vehicles in its operations.

The corporate history of Globe, an Indiana corporation controlled through ownership of a majority of its outstanding capital stock by Major A. Riddle, president, and two members of his immediate family, is also described in the case first cited, and in Universal Cartage Co.—Purchase—Dixie Cartage Co., 37 M. C. C. 107. It transports general commodities in interstate or foreign commerce pursuant to two pending applications filed under the



"grandfather" clause. In No. MC-3339, it claims rights as a common carrier, serving all intermediate points, over routes, in territory bounded on the east by Buffalo, N. Y., and Pittsburgh, Pa.; on the south by Wheeling, W. Va.; Columbus and Cincinnati, Ohio, Louisville, and Evansville, on the west by St. Louis, and Peoria, Ill., and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pa.; and in No. MC-3340 it claims rights as a contract carrier for Universal Carloading & Distributing Company, a forwarding company, between the same points and over the identical routes. For the purpose of this proceeding, only the operations of Globe as a common carrier will be considered, and our findings will authorize purchase only of its rights to operate as a common carrier. Hemingway Bros. Interstate T. Co.—Purchase—Finkel Motor, 15 M. C. C. 702.

By agreement dated November 4, 1941, Hancock would purchase the operating rights of Globe under Nos. MC-3339 and MC-3340 for \$10,000, of which \$100 was paid as of the date of the agreement, and the remainder would be paid \$2,500 upon approval of the transaction by us, \$2,500 upon final approval by the last of the concerned State regulatory authorities, and \$4,900 within 10 days thereafter. Hancock's stockholders have agreed to contribute sums equal to the purchase price at the times and in the amounts necessary to meet the payments required under the agreement.

Hancock's balance sheet as of September 30, 1941, shows assets aggregating \$109,984, consisting of: Current assets \$55,134, 425 principally notes receivable \$10,628, accounts receivable, less reserve for uncollectible accounts, \$27,200, and material and supplies \$12,247; carrier operating property, less depreciation, \$48,527; and deferred debits, prepayments, \$6,323. Liabilities were: Current liabilities \$37,171, principally notes payable \$8,000, accounts payable \$15,857, and taxes accrued \$8,574; equipment and other long-term obligations \$18,137; reserves \$1,598; capital stock \$37,718; and unappropriated surplus, unearned \$20,980 and earned (debit balance) \$5,620. Its income statements for 1939, 1940, and the first 9 months of 1941 show net incomes of \$12,287, \$12,235, and \$18,481, respectively.

Globe's balance sheet as of September 30, 1941, shows assets aggregating \$166,153, consisting of: Current assets \$116,824, principally accounts receivable, less reserve for uncollectible accounts, \$113,235; carrier operating property, less depreciation, \$44,594; and deferred debits, prepayments, \$4,735. Liabilities were: Current liabilities \$67,620, principally accounts payable \$34,070 and taxes accrued \$22,549; equipment obligations \$16,074; reserves \$31,275; capital stock \$21,000; and unappropriated surplus, earned, \$30,184. Its income statements for 1939, 1940, and the



first 9 months of 1941 show net incomes of \$46,188, \$24,754, and \$19,531, respectively.

With certain exceptions, principally between Evansville and Prospect, Evansville and Indianapolis over certain short-cut routes, and Angola and Detroit, via Coldwater, Hancock's regular route operations are over routes duplicated by those claimed by Globe; the latter's operations, however, being considerably more extensive. Both carriers serve Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintain duplicate terminal facilities at a number of such common points. Approximately 65 percent of Globe's traffic consists of business handled for the above-mentioned forwarding company, and as a result its flow of traffic is unbalanced. As an example, Globe's traffic is heavier west into St. Louis than in the reverse direction, necessitating dead-heading of equipment from that point. Hancock, on the other hand, enjoys heavier traffic east out of St. Louis than in the reverse direction. Globe does not believe it would be justified in expending additional funds in an effort to develop a better balanced operation, and, as its functions and facilities substantially duplicate those of Hancock, the desired result can be accomplished through unification of the operations in Hancock. The unification would result in better balanced lading between the common points now served, and in certain instances, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes. Hancock has

426 the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing additional equipment of owner-operators as at present, or by purchasing additional equipment. Savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck-miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, are estimated in excess of \$50,000<sup>1</sup> annually. No arrangements have been made respecting Globe's equipment,<sup>2</sup> but it is the intention of the parties to dispose of all the assets and surrender its charter for cancellation. Globe's regular employees would be afforded an opportunity to join Hancock's organization. Other competitive common carriers of property operate throughout the considered territory. The proposed unification is

<sup>1</sup> Of this amount, approximately \$20,000 represents the estimated cost to Globe, if latter remains in operation, in developing additional business to balance its present lading.

<sup>2</sup> Globe also utilizes the equipment of a substantial number of owner-operators, some of which Hancock proposes to employ.

in line with our purpose of encouraging corporate simplification in the interest of economical and efficient transportation.

As above indicated, Hancock is authorized to operate over a regular route, among others, between Evansville and Detroit via Vincennes, Terre Haute, Indianapolis, Angola, and Coldwater, restricted to transportation to or from Evansville.<sup>3</sup> Globe, among other routes, claims rights to operate between Evansville and Detroit over the same route as above to Angola, thence over U. S. Highway 20 to Toledo, and thence to Detroit, serving all intermediate points. Prior to issuance of the amended certificate on June 10, 1940, Hancock transported shipments between Detroit, on the one hand, and points on the above route between Indianapolis and Evansville, including Indianapolis, on the other, and it is alleged that there is a present demand for resumption of such service. Hancock requests that we modify its operating authority over the considered route to permit it to perform such service. In addition, Hancock also requests authority to serve approximately eight Government projects, the exact locations of which are not specified, but which are stated to be not more than 15 miles from Indiana points it is now authorized to serve. In support of such requested modifications, it offered testimony of two of its officers. Such testimony is general in character and shows that there are other motor carriers operating in the territory who are in a position to perform service between the points considered. It would appear that, under the unification of rights as here proposed, Hancock will be authorized to perform part of the additional service as requested, for, as previously stated,

427 Globe now claims rights to operate between Evansville and Detroit largely over this route, serving all intermediate points. We are of the opinion that the enlarged operating authority requested as to Hancock's rights is a matter not directly related to the section 5 proceeding within the contemplation of the notice of hearing herein, but is more properly for consideration in a separate proceeding under section 207. The nature and extent of the service which Hancock may render in conducting operations under the unified rights must be governed by the existing rights as confirmed and lawfully claimed.

Hancock now has no amount recorded in its "Other Intangible Property" account, but the amount proposed to be paid for Globe's rights would be recorded in such an account. Hancock has indicated its willingness to amortize such amount and requests that a period of 10 years be allowed. Considering the net

<sup>3</sup> A prior certificate issued in No. MC-25567, October 14, 1939, authorized service between Detroit, on the one hand, and all intermediate points on this route between Evansville and Indianapolis, including Indianapolis, on the other.

balance in surplus and Hancock's earning record, we are of the opinion the amount may be immediately written off without undue hardship, and our findings will be conditioned accordingly.

We find that purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5 (2) (a), and will be consistent with the public interest, and that, if the transaction is consummated, and pending determination of Globe's "grandfather" applications in Nos. MC-2339 and MC-3340, Hancock shall be entitled to conduct the common-carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and will be entitled to a certificate covering any "grandfather" common-carrier rights which may be confirmed as a result of those applications, which rights are herein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; provided, however, that, if the authority herein granted is exercised, Hancock Truck Lines, Incorporated, shall immediately write off to surplus account the amount properly assignable to its "Other Intangible Property" account as a result of the transaction.

An appropriate order will be entered.

428

Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 16th day of May, A. D. 1942

No. MC-F-1743

~~HANCOCK TRUCK LINES, INCORPORATED—PURCHASE—GLOBE  
CARTAGE COMPANY, INC.~~

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That purchase by Hancock Truck Lines, Incorporated, of Evansville, Ind., of operating rights of Globe Cartage Company, Inc., of Indianapolis, Ind., be, and it is hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with

sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, unless the authority herein granted is exercised within six months from the date hereof, this order shall be of no further force and effect.

It is further ordered, That recital in said report of balance-sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That, before recording the purchase upon its books, Hancock Truck Lines, Incorporated, shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein.

By the Commission, division 4.

[SEAL]

W. P. BARTEL, *Secretary*.

430

*Defendant Commission's Exhibit 2*

Before the Interstate Commerce Commission

MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

*Petition of Railroad Protestants in Central Freight Association Territory, Official Classification Territory, Southern Freight Association Territory, South-Western Territory*

(1) To reconsider and review the order of Division 5 of October 7, 1942.

(2) To stay effective date of order of Division 5 of October 7, 1942, which effective date is November 24, 1942.

(Nov. 21, 1942)

431

Now comes the petitioners, Railroad Protestants in Central Freight Association Territory, Official Classification Territory, Southern Freight Association Territory, and South-Western Territory, and respectfully request reconsideration by the

Commission of the Report of Division 5 rendered October 7, 1942; that said Order be modified and certain restrictions placed therein; and that the said Order be further stayed by the Commission.

#### ARGUMENT

The petitioners hereinabove named submit that Division 5 of the Commission erred in not placing certain restrictions in said Order of October 7, 1942, in view of the limited operations by the applicant as is substantiated by the evidence of record.

Petitioners submit that the concurring opinion by Commissioner Rogers in the within Application be adopted by the Commission and the said Order of October 7, 1942, be modified in accordance therewith. The said concurring opinion is hereinafter quoted.

"I approve the report. However, I believe that there is merit in the contention, discussed in the report, that any authority granted to applicant should be restricted to the type of traffic which applicant has exclusively transported since prior to the statutory date. This could be accomplished by a restriction of the authority to: \* \* \* traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders, as defined in section 402 (a) (5) of part IV of the Interstate Commerce Act.' Freight forwarders do not occupy the mere status of a shipper."

432 From the Recommended Report and Order served September 24, 1942, in the applications of Midwest Haulers, Inc., MC-13900 and Sub No. 2, the following restriction and language is quoted:

"The examiner further finds in No. MC-13900 (Sub-No. 2) that the present and future public convenience and necessity require operation by applicant; in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, which are at the time moving on bills of lading of freight forwarding companies \* \* \*." (Sheet 6.)

The effective date of the Recommended Order served September 24, 1942, pending the further order of the Commission, was stayed by the Order of Division 5 of October 23, 1942.

In the Midwest case that operation was also for the Universal Carloading & Distributing Company. The Examiner in that report also referred to the holding by the Commission in the application of Albert Charles Gans, reported in 32 M. C. C. 416.

From the dissenting opinion of Commissioner Patterson in the instant Globe application, the following is quoted:

"This applicant since prior to June 1, 1935, has served only the Universal Carloading & Distributing Company under written contracts and has never held itself out to serve the general public. In my opinion it is and has been exclusively a contract carrier."



CONCLUSION

Wherefore, petitioners respectfully request that the Order of Division 5 of October 7, 1942, be so modified and restricted as to traffic and that limitations be placed therein only authorizing the transportation of general commodities which are at the time moving on bills of lading of freight forwarding companies; and that the Report of Division 5 of October 7, 1942, which becomes effective November 24, 1942, be further stayed by the Commission.

Respectfully submitted.

OSCAR LINDSTRAND,

Oscar Lindstrand,

*Counsel for Protestant Rail Carriers.*

433

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition has been served this day upon all parties of record, by mail, first class postage prepaid, and my signature below constitutes the signature required by Rule 17A of the General Rules of Practice.

OSCAR LINDSTRAND,

Oscar Lindstrand.

NOVEMBER 21, 1942.

434

*Deft. Commission's Exhibit 1*

Before the Interstate Commerce Commission

Docket Nos. MC-3339, MC-3340.

GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

*Petition of the Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc. of Indiana for Reconsideration by the Commission of the report of Division 5, decided October 7, 1942, and for oral argument in connection therewith.*

Nov. 12, 1942

435

Comes now petitioners, The Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc. of Indiana and respectfully request reconsideration by the Commission of the report of Division 5, decided October 7, 1942, and oral argument in connection therewith. Petitioners request said reconsideration in the following respect and for the following reason:

1. Division 5 erred in failing to restrict the authority granted to applicant to traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders, as defined in Section 402 (a) (5) of Part IV of the Interstate Commerce Act.

#### HISTORY OF THE CASE

This proceeding involves the applications of Globe Cartage Company, Inc., hereinafter referred to as "Applicant," for a certificate or a permit under the so-called "Grandfather Clause" of the Interstate Commerce Act, Part II. The operations involved in both applications are identical except that one requests authority as a common carrier while the other requests authority as a contract carrier.

Hearing was held on said applications at Toledo, Ohio on November 6, 1939, at which time numerous parties protested the granting of the authority sought. On August 17, 1940, the report and order recommended by the Examiner was issued which recommended that applicant be granted authority to operate as a common carrier in the transportation of general commodities in truckload quantities over routes and between points as were specifically set forth in Appendix B attached to said order. The application for contract carrier authority was denied in full. Various protestants filed exceptions to the report and order, contending that the Examiner erred in recommending that applicant be granted authority to operate over certain routes and between certain points and for the further reason that the Examiner failed to restrict the authority to the type of operations that applicant had conducted on and prior to June 1, 1935, and continuously thereafter. On October 26, 1942, the report of Division 5 was served on the parties. Said report grants to applicant authority to operate over certain routes and between certain points as are specifically described in Appendix B attached to said report as a common carrier of commodities generally without restriction. Division 5 refused to restrict the authority so granted to that type of operation which applicant conducted, namely, for forwarding companies only. In this connection, Division 5 held as follows:

"Section 203 (a) (14) of the Act provides that the term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for compensation. We cannot, consistently with applicant's common carrier status, restrict its service to particular shippers, namely, freight forwarders, and to restrict the traffic which it may transport to shipments made by

freight forwarders would in effect and result be a restriction of applicant's service to such forwarders."

In this connection, it should further be pointed out that, while Commissioner Rogers approved the report, nevertheless in a separate opinion he did state that it was his belief that there was merit in the contention of protestants that applicant should be restricted to traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders. Commissioner Patterson, in dissenting from the report, stated that it was his opinion that applicant has been exclusively a contract carrier, inasmuch as, since

437 prior to June 1, 1935, applicant has served only the Universal Carloading and Distributing Company under written contracts and has never held itself out to serve the general public. Petitioners respectfully contend that Division 5 erred in failing to restrict the authority granted to applicant to traffic which is at the time of transportation by applicant in the primary custody of and moving on bills of lading of freight forwarders as defined in Section 402 (2) (5) of Part 4 of the Interstate Commerce Act.

#### ARGUMENT

Before discussing the legal aspects involved in petitioner's contention, certain basic facts must be set forth. It should further be noted with respect to said facts that they are admitted and there appears to be no dispute whatsoever with respect thereto. As its proof of operations conducted since prior to June 1, 1935, applicant offered only evidence of service performed for the Universal Carloading and Distributing Company which will hereinafter be referred to as "Universal." The record discloses that applicant relied entirely on the operations for Universal as a basis for proving its case. It is admitted that applicant's operations on and prior to June 1, 1935, and since that date have been for Universal, which is a freight forwarder within the definition of that term as defined in Part IV of the Interstate Commerce Act. The record further describes the type of operation conducted which has consisted of a so-called dock to dock movement in the handling of truckload quantities for Universal. In other words, applicant's vehicles have been loaded at the docks of Universal and seals placed thereon. The vehicles have then been moved to docks of Universal in other cities where they were unloaded after the seal was broken by the Universal employees. The shipments moved on a so-called "manifest" of Universal subject to rates and charges existing in a contractual agreement between Universal and the applicant. Applicant had no dealings

with the original shipper whatsoever. The applicant had no contractual agreement in the form of a bill of lading or otherwise with the original shipper.

438 The record further discloses that the original shipper looked to Universal for satisfaction of any claims arising out of damage or loss to merchandise. In other words, Universal was looked to by the shipper for the satisfaction of such claims, and it, in fact, paid such claims to the shipper. The applicant was then looked to by Universal for reimbursement.

It is obvious then, without dispute, that applicant's operations on and prior to June 1, 1935, and thereafter involved only the transportation of traffic for Universal in a so-called dock to dock movement. Petitioner contends that under those circumstances the Commission should have restricted applicant's authority to traffic, which at the time of transportation by applicant is in the primary custody of and moving on bills of lading of freight forwarders as defined in the Act. Division 5 in its report rejected that contention. The Division relied on Section 203 (a) (14) of the Act, which provides that a common carrier by motor vehicle means any person which holds itself out to the general public to engage in transportation by motor vehicle for compensation. Relying on this section, the Division held that it cannot consistently with applicant's common carrier status, restrict its service to particular shippers, namely, freight forwarders. It is true that applicant, in line with various decisions of the Commission, is a common carrier, American Motor Dispatch, Inc., Common Carrier Application, 26 M. C. C. 346; Howey Cartage Company, Contract Carrier Application, 28 M. C. C. 102.

It may be accepted as an established principle that carriers who perform a service for a freight forwarder are conducting operations as common carriers. The next question which logically arises is whether or not that common carrier status precludes a restriction which would limit said carriers to that type of operation. The Division held that it cannot consistently with applicant's common carrier status, restrict its service to particular shippers, namely freight forwarders. This Commission has 439 held that forwarders, such as Universal, have the status of shippers with respect to the carriers employed by them—Freight Forwarding Investigation, 229 I. C. C. 201. However, this Commission has also held that forwarders such as Universal are common carriers at common law and have such a status—Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211. It is apparent then that freight forwarders under the Commission's decision not only have the status of shippers—they are more than shippers. They are, in effect, common carriers. Assuming, however, for the sake of argument, that said forwarders



must be considered as shippers only, it nevertheless does not follow that carriers who operate exclusively for them cannot legally be restricted to that type of service. It is admitted that under the Act a common carrier service cannot be restricted to certain shippers. There can be, however, no valid criticism of a limitation on the class of property to be transported or a restriction defining, in terms of the property which applicant shall be authorized to transport, the particular kind of common carrier service which it shall be authorized to perform.

Section 203 (a) (14) of the Act defines common carriers by motor vehicle, and in so doing, speaks in terms of those who hold themselves out to transport property or any class or classes thereof. This Commission has always recognized that it has the legal right and duty to specify the service to be rendered, and it has further recognized that that service may be as readily defined in terms of the particular commodity or class of commodities to be transported as in any other way. Section 208 of the Act requires that certificates granted it specify the service to be rendered. The situation involved here is clearly analogous to the cases in which the Commission has restricted common carrier applicants proposing to serve only the Railway Express Agency. In dozens of such cases this Commission has restricted such common carrier authority to the transportation of general commodities in express service, general commodities which are at the time moving on bills of lading of the express company, or general commodities which are at the time in the primary custody of and moving on bills of lading of an express company. *Railway Express Agency, Inc., Extension*, 26 M. C. C. 641; *Earl S. Bosworth, Contract Carrier Application*, 27 M. C. C. 781. It is extremely difficult to see any factors which could be held to distinguish the situation involved in this proceeding from that involved in the *Express Agency* cases. In those cases the Commission recognized that it had the legal right under the Act to restrict a common carrier service by specifying the type of service to be performed. It has recognized that same right in numerous cases involving common carrier certificates for the performance of a substituted rail service—*Pennsylvania Truck Lines, Inc., Common Carrier Application*, Docket No. MC-43157, decided March 24, 1942. Moreover, this Commission has innumerable times authorized special types of common carrier service which are limited solely by restrictions in terms of the class of property to be transported such as bulk liquids, heavy machinery, iron and steel products, or such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses. In the proceeding now before the Commission, Division 5, however, stated that "To restrict the traffic which it may transport to shipments



made by freight forwarders would, in effect and result, be a restriction of applicant's service to such forwarders." There can be no questioning of this statement. Indeed, the purpose of the restriction is to restrict applicant's service in such a way that it will be limited to operations for freight forwarders. While that may be the end which is sought, there still exists no legal prohibition against this Commission specifying the service in terms of the particular commodity or class of commodities to be transported. Division 5's statement is just as applicable to the Express Agency cases, the substituted rail cases, the steel hauler cases; and, in fact, every case which involves the specifying of the service to be rendered in terms of the class of commodities to be transported.

When the Commission restricted the Railway Express  
441 Agency certificates to commodities which are at the time in the custody of and moving on bills of lading of the express company, it did nothing more in effect than restrict the operations to serving the Railway Express Agency. The same is true of the restrictions placed in the various certificates issued for substituted rail service. When a common carrier certificate specifies that only iron and steel products may be handled, what is the effect? It is clear that the effect of such a certificate is to limit the operations to the serving of shippers of iron and steel products. The Commission has never in the past looked to the legal effect of a restriction to determine whether it might properly be imposed.

The Commission has held that it may impose restrictions as to the class of property to be transported, regardless of the effect of the restriction. Moreover, this Commission has already, in a case involving the identical circumstances involved in this proceeding, held that it may limit service to the transportation of general commodities which are at the time moving on bills of lading of freight forwarding companies.

We wish to refer the Commission's attention at this time to the case of Albert Charles Gans, Common Carrier Application, 32 M. C. C. 416. In that case, the Commission discussed the very problem involved in this proceeding and arrived at the conclusion that it could legally and properly restrict a common carrier certificate to the transportation of traffic which is at the time moving on bills of lading of freight forwarding companies. We quote as follows from Pages 418 and 419 of the Commission's decision in that case:

"We cannot, consistently with applicant's common-carrier status, restrict its service to certain shippers, namely, forwarders, but there can be no valid criticism of a limitation on the class of property to be transported or a restriction defining, in terms of the property which applicant shall be authorized to transport, the particular kind of common-carrier service which it shall be

authorized to perform. Indeed, section 203 (a) (14) of the act, defining common carriers by motor vehicle, speaks in terms of those who hold themselves out to transport 'property, or any class or classes thereof.' The situation is closely analogous to those cases in which we have restricted common-carrier applicants proposing to serve only the Railway Express Agency 442 to the transportation of general commodities 'in express service' or 'general commodities which are at the time moving on bills of lading of a railway express company.' By the same token, we believe that we properly may restrict applicant here to the transportation of shipments which are at the time moving on bills of lading of freight-forwarding companies. In this connection, it is significant that section 208 of the act requires that certificates granted shall specify 'the service to be rendered.' Service, which we are required to specify, may as readily be defined in terms of the particular commodity or class of commodities to be transported as in any other way. For example, we almost daily authorize special types of service which are limited solely by restrictions in terms of the class of property to be transported, such as 'bulk liquids,' 'heavy machinery,' or 'such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses.' The service herein authorized will be limited to the transportation of general commodities which are at the time moving on bills of lading of freight-forwarding companies."

Petitioner respectfully contends that this Commission has the legal right under the Interstate Commerce Act, Part II, to specify the service to be rendered in terms of the class or classes of commodities to be transported. Moreover, it has this right, regardless of the fact that the effect of such a restriction may be in effect to restrict the service to certain shippers. If the effect of the restriction is to be considered, Section 208 of the Act, requiring certificates to specify the service to be rendered, will be nullified, and Section 203 (a) (14) of the Act, defining common carriers as those who hold themselves out to transport property or any class or classes thereof, must be held to have no significance or reason for existence so far as the last clause thereof pertaining to class or classes thereof is concerned.

Petitioner respectfully urges that the Commission may legally and properly place such a restriction in common carrier certificates as it has done in the past. Moreover, it should be pointed out at this time that this problem is not a purely legal matter nor purely academic. It is a very practical problem to the motor carriers who will be faced or can be faced with wholesale additional competition in the event that the restriction is not adopted.

Applicant herein has been granted authority to transport general commodities over 23 routes which cover the greater  
 443 part of Central Territory and every important point located therein. If this applicant is permitted to expand its service by transporting freight for the public generally in the transportation of all class or classes of property a very imposing new truck system will enter the field in competition with existing carriers. Moreover, the problem is not confined to this carrier alone. There are numerous other cases pending before this Commission which involve widespread operations of the very type herein involved. If the restriction is not adopted, many new widespread systems of operations will be brought into the field and facilities for serving the public generally in the transportation of all classes of property will be multiplied many times to the damage and prejudice of those carriers who have for years maintained such a service in the territory.

An operation such as that conducted by this applicant since prior to June 1, 1935, involving as it does only a dock to dock service for Universal, is one of the simplest operations which exist in the motor carrier industry. It is indeed one of the easiest types of operation to institute if you can make arrangements with the forwarder for the transportation of the traffic. No great organization is required, and terminal facilities in the various cities served are unnecessary. To permit as a practical matter such operations to become a basis for a certificate which will permit such carriers to handle all classes of property for the general public will be manifestly unfair to the many carriers who have, since long prior to June 1, 1935, maintained extensive organizations and facilities to transport all types and classes of property for any one who may have called on them to do so. Petitioners respectfully contend that such a restriction may legally be adopted by this Commission and should be adopted.

#### CONCLUSION

Wherefore, Petitioners respectfully request that the authority granted to applicant be restricted to traffic which is at  
 444 the time of transportation by applicant in the primary custody of and moving on bills of lading of freight forwarders, as defined in Section 402 (a) (5) of Part IV of the Interstate Commerce Act. Because of the importance of the question involved herein, petitioner also requests opportunity for oral argument in connection therewith.

Respectfully submitted.

P. J. HERGENROEDER,

*Attorney for The Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc. of Indiana and Motor Express, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all parties of record, or their counsel, by mailing a copy thereof, properly addressed, postage paid.

Dated at Cleveland, Ohio, this 10th day of November 1942.

P. J. HERGENROEDER.

445

*Defendant Commission's Exhibit 3*

Before the Interstate Commerce Commission

Dockets No. MC-3339 and MC-3340

GLOBE CARTAGE COMPANY, INC.—COMMON CARRIER APPLICATION

*Applicant's reply to petition for reconsideration and for oral argument of protestants Cleveland, Columbus & Cincinnati Highway, Inc.; Motor Express, Inc.; and Motor Express, Inc. of Indiana*

Nov. 20, 1942

446

Comes now the applicant, Globe Cartage Company, Inc., and files this Reply to the petition for reconsideration and oral argument of the Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc., of Indiana. Applicant respectfully submits that such request for reconsideration and for oral argument should be denied for the following reasons:

A. To hold that applicant is a common carrier and then to prohibit applicant from serving the general public would do violence to the clear terms of the Motor Carrier Act.

B. A restriction in a Certificate which might be appropriate under circumstances where the applicant is seeking new authority and where such applicant consents to such restrictions is not proper in a Certificate granted to a nonconsenting "grandfather" applicant.

C. The petition of the petitioners does not conform to the requirements laid down by the Rules of Practice of the Interstate Commerce Commission, and therefore should be given no consideration.

## ARGUMENT

The document entitled "Petition of the Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc., of Indiana for Reconsideration by the Commission of the Report of Division 5, Decided October 7, 1942, and for Oral



Argument in Connection Therewith" is predicated upon one proposition and one proposition alone, namely: That applicant should be restricted to transportation of commodities generally "in the primary custody of and moving in bills of lading of freight forwarders" as defined in Section 402 (2) (5) of Part IV of the Interstate Commerce Act.

Petitioners rely upon the provisions of the Motor Carrier Act (Section 203 (a) (14)), defining common carriers, which speaks in terms of those who hold themselves out to transport property or any "class or classes" thereof. The petition must stand or fall upon the power of the Commission to circumscribe the language used by Congress and intended by Congress at the time of the enactment.

It is elementary to state, and we would not burden the Commission by a citation of authority, that the words "class or classes" when used in connection with property and the definition of a motor carrier had reference to a specific, definite, and clear technical usage, namely: property which, at the time of the enactment, was classified in classifications, tariffs, and schedules. Therefore, in using the words "class or classes" Congress intended to and did circumscribe the power of the Commission in its restrictive power. That is to say, in the determination of a common carrier authority and in issuing a certificate for the hauling of commodities, the Commission was to restrict common carriage to a class or classes of property; and the Commission cannot, by the use of such a device, limit the authority to certain classes of shippers.

"Class or classes" as used in the Act refers to property which, as a rule, was set up in a tariff or tariffs then in vogue, and in the usage of the trade confined within some tariff schedule or schedules. See *Rea vs. Mobile etc. Co.*, 7 I. C. C. 43; *Barrett vs. Chicago, etc. R. Co.*, 20 I. C. C. 79; *Express Rates*, 83 I. C. C. 606.

At the time of the consideration of the Motor Carrier Act by Congress, there had never been and there was not then in existence any class or classes of property which could be said to be freight forwarder property. The freight forwarder, as he existed and as considered before Congress at that period, was a shipper which was engaged as a common carrier at common law in the assembly, consolidating, and actual transportation, or provision therefor, of every conceivable class or classes of property.

Congress was aware of the existence of the freight forwarder at the time the Motor Carrier Act was passed. The report of the Senate Committee hearings held on April 10th to 19th, 1934, of the bill (S. 3266) to amend the Railway Labor Act (73rd Congress, 2nd Session) shows that Congress was cognizant of the freight forwarder.



Later, in reenacting the Railroad Retirement Act, after the first such Act was declared unconstitutional in 1934, two new bills (H. R. 8551 and S. 3151) were introduced, each of which, in their original form, included freight forwarders under the definition of carriers. However, in the legislative process, those definitions were eliminated. The existence of the freight forwarder, however, was a matter concerning which Congress was aware. And that is the point. Whether a freight forwarder is a shipper or a carrier, certainly, it is not a class of property nor is it a shipper or carrier of any well-defined classes of property other than commodities generally.

Further, there is a distinction between an application predicated upon operations existing on June 1, 1935, and operations subsequently begun. The former, a "grandfather" operation, was to meet a test for a Certificate before the Commission upon facts altogether different than the latter, or "new" operation. A "grandfather" operation was not to be tested by convenience and necessity but merely, by the question of holding out, backed by an actual service on June 1, 1935, and continuously thereafter. The latter, or "new" operation, was to be tested by convenience and necessity, and the Commission in the latter case had and has the authority to determine what the "convenience and necessity" of the public, according to the facts shown of record, would require.

It becomes apparent immediately, when distinguished as hereinabove, that the test of holding out an actual service is not a consideration in a new or beginning application, whereas it is the supreme and all-encompassing test in a "grandfather" application.

Your applicant, Globe Cartage Company, Inc., in the instant case was a "grandfather" applicant, and the question of test to determine its Certificate and the scope thereof is simply: What did it do on June 1, 1935, that it has continued to do? By this test, it is clear that it hauled every conceivable class and classes of commodities and, therefore, was a common carrier of commodities generally. In its "grandfather" application as filed, which was made a part of the record in this case, an Exhibit on the first page of said Exhibit B-1, C-2, there are letters from seven different shippers other than Universal Carloading & Distributing Co. whose businesses ran the gamut of that which is handled by a salvage company, a canning company, a tire company, a nut margarine company, a flour, feed, and grain company, a warehouse and storage company, and an electrical motor and accessory company, namely: National Salvage Company, 450 Stokely Brothers Canning Company, Inc., Goodyear Service, Inc., Indiana Nut Company, B. J. Gibson Company, Strohm Warehouse and Storage Company, and Manufacturers Supply

Company, all of which is to be taken into consideration in the test of whether or not it was holding out in the actual transportation of any class or classes of property.

The Albert Ganz Common Carrier Application case, 32 M. C. C. 416, relied upon in the motion for reconsideration is not a persuasive authority. First, it is a new or beginning application, and not a "grandfather" application. Second, the carrier himself expressed a desire to limit his service to that moving on bills of lading of freight forwarding companies. There was no question in that case of holding out, nor of continuous operation since. It was merely a question of what the "convenience and necessity" of the public dictated, measured by applicant's desire to render service. It is patent that the Commission found that the "convenience and necessity" of the public as proven in the Ganz case was for a service limited to freight moving on the bills of freight forwarding companies and as circumscribed by the desire of the applicant to so engage himself.

There seems to be a confusion on the part of the petitioner for reconsideration by reason of some loose language employed in the Ganz case to the effect that the Commission had authority in the Railway Express Agency cases to limit service to applicants in the Railway Express cases to the transportation of general commodities which are at the time moving on bills of lading of the Railway Express Company. This confusion is readily understandable. It flows from a miscomprehension of the nature of the applications involved. Railway express is a known, defined service wherein articles of light weight, high rate, or extreme value are moved in railway passenger cars. "Express" as  
451 such was a definite, clearly understood "class" of property, and so understood by Congress at the time of the enactment of the Motor Carrier Act.

This is clearly the case as evidenced by the concurring opinion of Commissioner Eastman in the case of Railway Express Agency, Inc., Determination of Status, No. MC-66562, reported at 1 Federal Carrier Cases, 2155, in which the following language appears (Page 472):

"There is nothing which an express company undertakes to carry which it is not the duty of the ordinary railroad company to carry, but with respect to a *class of traffic, particularly small packages, which requires expedited service and special attention*, the express company is permitted to function in order to secure the benefits of specialization and centralization in organization." [Italics supplied.]

Thus, it is evident that when one speaks of property transported by express companies, certain recognized classes of property (small packages, valuables, etc.) are clearly understood.

On the other hand, to refer to property as property transported by freight forwarders conveys no intelligence, since the property handled by freight forwarders includes every conceivable type of commodity and class of property with the possible exceptions of freight in bulk and small and valuable articles.

Further, in the findings of the Commission in the Railway Express Agency, Inc., case, supra, the Commission finds as follows:

"That where motor carriers in their own right perform service for the Agency or any of its subsidiaries, such motor vehicle operations are not those of the Agency or its subsidiaries within the meaning of Section 203 (a) (14) of Part II of the Interstate Commerce Act."

It follows, therefore, that such motor carriers rights are independent of the express company. In like manner, the rights of the applicant, Globe Cartage Company, Inc., are completely independent of Universal Carloading and Distributing Company.

452 It is noteworthy that nowhere in the Railway Express Agency, Inc., cases is there any mention that any such independent motor carriers should in any way be limited to the transportation of property, the original bill of lading of which was issued by an express company.

Petitioners cannot take any comfort in those cases where the express company itself is limited by certificate to the transportation of property usually transported by express companies, in those cases where, under authority of the Railway Express Agency, Inc., case, certificates were issued to the express company for operations conducted by itself for itself, as opposed to the instances where the transportation was performed for the express company by other motor carriers in their own right.

In the first place, as pointed out above, property transported by express companies are of a distinctly recognizable class.

In the second place, in the applications filed by the express company for certificates, the express company limited its prayer to the acquiring of the right to transport just that class (express) of property. In other words, just like in the Ganz case, supra, the express company consented to such restriction.

In the instant case, however, neither by the application nor by any subsequent conduct has applicant consented to such restrictions.

Therefore, the express company cases are of no value in the decision of this case.

453 The section of the Act defining a common carrier (Sec. 203 (a) (14)) defines such carrier as one who

"undertakes \* \* \* to transport passengers or property, or any class or classes of property for the general public \* \* \*"

Any artificial interpretation of the term "class or classes" which actually prohibits a carrier to serve "the general public" vitiates the definition as Congress laid it down.

Either applicant is or is not a common carrier.

If it is a common carrier, then it is authorized to transport for the general public the class of property (which, in this case, is conceded to be commodities generally) which it has been transporting in the past.

So much for the merits of the alleged petition for reconsideration.

But such petition is not entitled to consideration on its merits, since it violates Rule 101 (a) of the Rules of Practice of this Commission by failing to indicate in the prayer that it is a petition for reconsideration.

By reason of the foregoing, it is respectfully submitted that the said petition be denied.

Respectfully submitted.

JACOB WEISS,

Attorney for the Applicant.

454

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all parties of record, or their counsel, by mailing a copy thereof, properly addressed, postage paid.

Dated at Indianapolis, Indiana, this 16th day of November 1942.

JACOB WEISS.

455

*Defendant Commission's Exhibit 4*

Before the Interstate Commerce Commission

No. MC-3339, MC-3340

IN THE MATTER OF GLOBE CARTAGE COMPANY, INC., COMMON CARRIER APPLICATION

*Petition of the regular common carrier conference of the American Trucking Associations, Inc., for reconsideration by the Commission of the report of Division 5, decided October 7, 1942*

Jan. 15, 1943

456

Comes now your intervenor, Regular Common Carrier Conference of the American Trucking Associations, Inc.,

and respectfully requests reconsideration by the Commission of the report of Division 5, decided on October 7, 1942 in the above-entitled case.

Reconsideration is asked for the following reason:

(1) Division 5 erred in failing to restrict the authority granted to applicant to traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders, as defined in Section 402 (a) (5) of Part IV of the Interstate Commerce Act.

#### HISTORY OF THE CASE

This proceeding involves the applications of Globe Cartage Company, Inc., hereinafter referred to as "Applicant," for a certificate or a permit under the so-called "Grandfather Clause" of the Interstate Commerce Act, Part II. The operations involved in both applications are identical except that one requests authority as a common carrier while the other requests authority as a contract carrier.

457 Hearing was held on said applications at Toledo, Ohio, on November 6, 1939. On August 17, 1940, the report and recommended order by the Examiner was issued which recommended that applicant be granted authority to operate as a common carrier in the transportation of general commodities in truck-load quantities over routes and between points set forth in Appendix B, attached to the order. The application for contract carrier authority was denied in full. On October 26, 1942, the report of Division 5 was served on the parties. This report would grant to applicant the authority to operate over certain routes and between certain points, and grants to applicant authority as a common carrier of general commodities without restriction. Division 5 refused to restrict the authority to that type of operation which applicant conducted i. e., for forwarding companies only.

The facts in regard to operations are fully set forth in the report. This intervenor urges the Commission to reconsider its findings in regard to the terms and conditions of the certificate to be issued to the applicant. We submit that the Commission erred in failing to restrict the authority granted to applicant to traffic which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders. We submit that the Commission erred in stating that it cannot restrict applicant's service to freight forwarders.



## ARGUMENT

The applicant has always operated a service limited to freight forwarder traffic and considered itself a contract carrier subject to the Permit Sections of the Act.

458 Section 203 (a) (14) defines "common carrier by motor vehicle" as follows:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any *class or classes thereof* for compensation \* \* \* [Italics supplied.]

The Commission has heretofore considered this question in Albert Charles Gans, Common Carrier Application MC-32416, 32 M. C. C., 416, under comparable circumstances authorized the transportation of general commodities "which are at the time moving on bills of lading of freight-forwarding companies."

In Maurice Carl Mayhew, Common Carrier Application, 27 M. C. C., 205, Docket Nos. MC-6355 and MC-6355 (Sub-1), the right was granted to haul general commodities "which are at the time moving on bills of lading of a railway express company."

In No. MC-45192, James E. Merriman and Joseph H. Hunter, Common Carrier Application, 17 M. C. C., p. 285, the Commission held:

"Section 203 (a) (14) of the act contemplates that a common carrier may transport only a '*class or classes of property*' and we have found in former cases that the authority issued under the '*grandfather*' clauses of sections 206 (a) and 209 (a) of the act should reflect any limitation in the undertaking of common carriers as indicated by the service actually rendered on the statutory date. They also contend that on and prior to June 1, 1935, they were holding themselves out to the shipping public to transport general commodities. Although, as stated, they transported general commodities subsequent to that date, the evidence submitted does not convince us that they either transported or held themselves out to transport general commodities on or prior to the statutory date." [Italics supplied.]

459 In No. MC-61766, Dakota Transportation, Incorporated, Common Carrier Application, 3 M. C. C., p. 624, the Commission held:

"It is argued that the act does not require that the certificate specify the commodities to be transported, and that an applicant's authority need not be confined to any special commodities even though its transportation happened to be so limited as of June 1, 1935. Section 203 (a) (14) of the act clearly contemplates

*that a person may be a common carrier of a 'class or classes of property'. Applicant so limited its undertaking in its operations eastbound to Chicago over route 1, and the authority to be granted herein must be limited accordingly.* [Italics supplied.]

It is clear that applicant has undertaken to transport only freight forwarder merchandise, as described in the report, and there is no evidence which would support a finding that it has the right under the "grandfather" clause to transport merchandise other than that just specified.

Applicant conducted its business as a contract carrier and as such did not hold itself out to serve the general public; the record shows that in line with this policy it confined its holding out and its services to freight forwarder traffic.

The basic and essential findings of the Commission in the instant proceedings plainly show that there was neither a holding out nor actual operations for the general public.

In *Sprout & Davis, Inc.*, 9 M. C. C. 679, the Commission said, "Applicant may have held itself out to serve points other than those described, even going so far as to make a plan, as a result of tests, to serve a more extensive area, yet, if there is no evidence of operation consistent with such holding out, there is not a bona fide operation."

Section 208 (a) specifying "terms and conditions of certificate" states, among other things, that any certificate issued under Section 206 "shall specify the service to be rendered." This 460 imposes upon the Commission the obligation of specifying in the certificate the various terms and conditions, including the type of service to be rendered. This being a "grandfather" application filed under the provisions of Section 206 (a), the service which should be authorized in the certificate is that service which applicant was rendering on the critical date. The Commission through failure to specify the service to be rendered (i. e., the continuance of the service being rendered on the "grandfather" date) would then create a transportation service not actually in existence on the "grandfather" date, because, stated otherwise, we must look to the applicant's "holding out" on the critical date. The Commission has found that applicant's entire operations, so far as shown by this record, have been for the Universal Carloading and Distributing Company.

It is therefore obvious that applicant's "holding out" goes entirely to a particular type of service falling within a particular class commonly known as "freight forwarders."

A certificate constitutes the carrier's authority to do business and the terms and conditions of the certificate as authorized in Section 208 (a), fix the limitation of the services to be rendered.

These terms may range from very limited to extensive operations. We submit that it was the legislative intent to vest in the Commission power to determine and specify in the certificate, by the use of adequate language, the extent of the operations in which the carrier may engage.

The Commission may specify the terms by designating the routes, the territories, and the commodities. The Commission may select the language and method of specification and  
461 the most convenient way to do so, and as in this particular case, the limitation may go to a class or classes of the general public.

It cannot be contended that a specification of the service to be rendered as sought by this intervenor will in any way prohibit applicant from continuing to render the identical service which it was rendering on the critical date. It cannot be stated that the applicant, having voluntarily limited its "holding out," can be injured by any requirement which maintains his status quo as of the "grandfather" date.

We submit that the situation is comparable with that of a common carrier who on the "grandfather" date had confined his services to those of transportation of household goods. Certainly, the Commission has the power to limit certificates in such cases to that class of the public which ships household goods; likewise, haulers of petroleum products who have voluntarily limited their services to that class of the public which ships petroleum products.

If common carriers hauling exclusively forwarder merchandise or household goods or petroleum products are to be given unlimited rights to haul general commodities, then those carriers which on the "grandfather" date did not so limit themselves, will be confronted with competition that did not exist on the "grandfather" date.

The Act provides that pending the determination of a "grandfather" application, the continuance of such operation shall be lawful. In the instant proceeding "such operation" was that of the transportation of forwarder merchandise. During pendency  
462 of the proceeding, the applicant may not lawfully expand such operations and certainly a "grandfather" certificate does not authorize extension of operations or the invasion of a field not occupied on the critical date.

Wherefore, intervenor respectfully requests that the authority granted to applicant be restricted to traffic, which is, at the time of transportation by applicant, in the primary custody of and moving on bills of lading of freight forwarders as defined in Section 402 (a) (5) of Part IV of the Interstate Commerce Act.

Respectfully submitted:  
Regular Common Carrier Conference of the American Trucking  
Associations, Inc.

R. J. McBRIDE,  
J. MANLEY HEAD,  
*Attorneys for Intervenor.*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first-class mail a copy thereof properly addressed to each party.

Dated at Washington this 13th day of January, 1943.

ROBERT J. McBRIDE.

463 *Defendant Commissioner's Exhibit 5*

Before the Interstate Commerce Commission

Docket Nds. MC-3339 and MC-3340

GLOBE CARTAGE COMPANY, INC.—COMMON CARRIER APPLICATION

*Reply to petitions for leave to intervene and for reconsideration of the regular Common Carrier Conference of the American Trucking Associations, Inc.*

Jan. 21, 1943

464 Comes now Globe Cartage Company, Inc., and, in reply to the above-mentioned petitions, respectfully request that they be denied.

I

PETITION FOR LEAVE TO INTERVENE

The petition for leave to intervene should be denied for the reason that it wholly fails to set forth any reason whatever for the failure of the petitioner to take steps to become a party to these proceedings before this late date, when even the time to file a petition for reconsideration has expired.

Furthermore, the petition on its face shows that the petitioner is not the sort of interested party whose property rights could be affected by the order in this matter. In discussing its interest, petitioner states "but such interest is general \* \* \*"

Under the circumstances, petitioner sets forth no persuasive reason for the granting of the Petition for Leave to Intervene.

## II

## PETITION FOR RECONSIDERATION

Of course, if the Petition for Leave to Intervene be denied, then the Petition for Reconsideration will necessarily not be considered by this Commission.

Even if it were considered, it would avail the petitioner nothing.

All the arguments set forth in the Petition for Reconsideration have been advanced in previous petitions for reconsideration heretofore filed. They are: "Petition for Reconsideration and for Oral Argument of Protestants Cleveland, Columbus & Cincinnati Highway, Inc.; Motor Express, Inc.; and Motor Express, Inc., of Indiana"; "Petition of Protestants, Pennsylvania Truck Lines, Inc., Cleveland and Buffalo Transit, Alko Express Lines, Suburban Motor Freight, Inc., Union Transfer Affiliated and Buffalo Storage and Cartage Company, and Petition of Railroad Protestants in Central Freight Association and Other Territory.

Replies were filed to each of the petitions filed by the three named protestants above.

So that the record will not be unduly burdened, references is hereby made to said replies as though they were incorporated herein. A glance at said replies will make it evident that reconsideration is not warranted in this case.

Suffice it to say that, in addition to the weaknesses inherent in the petitions of the other protestants, the instant petition suffers from the confusion of the petitioner, since it is obvious that petitioner does not recognize the distinction between classes of commodities, on the one hand, and classes of shippers, on the other.

It may be proper for the Commission to limit the authority of a common carrier to a class or classes of commodities. It is not proper to limit a common carrier to a class or classes of shippers.

To employ the device suggested by petitioner would be to circumvent the clear terms of the statute and render the provision defining a common carrier as a person which holds itself out "to the general public" without meaning.

Wherefore, it is respectfully prayed that the said Petition For Leave To Intervene and Petition For Reconsideration be denied.

Respectfully submitted,

JACOB WEISS, *Attorney for Applicant.*



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record, or their counsel, by mailing a copy thereof, properly addressed, postage paid.

Dated at Indianapolis, Indiana, this 19th day of January 1943.

JACOB WEISS.

467 Defendant Commission's Exhibit 6

Before the Interstate Commerce Commission

Docket No. MC-3339 (MC-3340) Now—Docket No. MC-25567,  
Sub No. 8

In the Matter of the Application of HANCOCK TRUCK LINES, INC.,\* SUCCESSOR TO GLOBE CARTAGE COMPANY, INC., UNDER THE "GRANDFATHER CLAUSE" OF PART II, OF THE INTERSTATE COMMERCE ACT.

*Petition for reconsideration in behalf of Hancock Truck Lines, Inc., and brief in support thereof*

Nov. 1, 1943

470 Comes, now, applicant, Hancock Truck Lines, Inc.,\* successor to Globe Cartage Company, Inc., petitioner herein, and respectfully requests reconsideration by the Honorable, The Interstate Commerce Commission, of its Report and Order decided August 4, 1943, in the above captioned Docket, and Oral Argument in connection therewith. Applicant requests said Reconsideration in the following respects only,<sup>1</sup> and for the following reasons:

471 The Commission erred, in denying the grant of the use of all of the operating routes to applicant, and, in denying applicant the right to serve all of the points and places as applied for in its "Grandfather" application and, by granting only a portion of such applied for operating routes, points and places.

<sup>1</sup> Additional to those points and places authorized; applicant requests authority to serve all points and places applied for over all the routes as applied for in its "Grandfather" application.

\*The Common Carrier operating rights of Globe Cartage Company, Inc., were by Order of Division 4, under date of May 16, 1942, in MC-F-1743, transferred to Hancock Truck Lines, Inc.

\*\*It is necessary to show Docket No. MC-3340 in order that the Record be clear and understood. The main Record on hearing was made in Docket No. MC-3340, which record (MC-3340) on hearing in Docket No. MC-3339 was incorporated in and made a part of MC-3339 (see transcript in Docket No. MC-3339, pp. 6 through 29, inclusive).

## PERTINENT BACKGROUND AND STATEMENT OF APPLICANT'S POSITION

NOTE.—Whenever, hereinbelow, Transcript references are made, these will be indicated as follows: (Tr. p. —), and, unless specifically noted otherwise, the page numbers in such references are to the Transcript of the Record in Docket No. MC-3340, which Record as previously indicated by note \*\* supra, was incorporated in and made a part of the Record in Docket No. MC-3339.

This proceeding involves the application of Globe Cartage Company, Inc., under the "Grandfather Clause" to which Hancock Truck Lines, Inc., succeeded by Order of Division 4, under date of May 16, 1942, in MC-F-1743, authorizing the acquisition by Hancock Truck Lines, Inc., hereinafter referred to as "Applicant" of all of the common carrier operating rights of Globe Cartage Company, Inc.

Hearing upon said application was held on November 6 and 7, 1939, at Toledo, Ohio.

Under date of August 17, 1940, a proposed report and order was recommended by an Examiner, to which Applicant and some protestants took exception. This Report and Order recommended that Applicant be authorized as a common carrier of commodities generally for the general public.

Under date of October 7, 1942, Division 5, entered and published its Report and Order. Applicant did not (for reasons set forth hereinbelow), file any petitions or motions in objection to this Report and Order of Division 5. Certain of the protestants and intervenors filed petitions for reconsideration which was granted by the full Commission in its Order of August 4, 1943.

The Order of the full Commission (August 4, 1943) on such Reconsideration incorporated its Report of the same date, and in substance reversed or modified drastically the Report and Order of Division 5, which had determined Applicant to be (under its "Grandfather" rights) a Common Carrier of general commodities for the General Public without restriction except, only as to the points and places to be served and the routes to be used in serving such named points.

Applicant did not file a petition for reconsideration of the Order and Report of Division 5, for the following reasons:

Prior to the effective date (and within the time) Applicant had prepared and was about to file such a petition when Applicant learned that certain protestants had filed or were about to file petitions for reconsideration. Applicant considered, upon reading the Petitions of the protestants, that it had sufficient on its hands to combat the prayers of such protestant petitions and that to inject a complaint against the limitation of points, places and

routes by Division 5, was, at the time, and, under those circumstances imprudent, and would bring too many issues for determination by the full Commission.

Applicant then decided (when it read protestants' prayers, together with the concurring opinion of Commissioner Rogers to the Division 5 Report) that at least for that proceeding it were best to fight for survival and forego some of its rights that it might live and continue in business, even though its ability to do business might, as a result, be curtailed.

Applicant chose rather to fight for what it then considered its life. To save its life, it was willing to suffer a dismemberment of some of its limbs.

473 Now the situation has changed. A new Report and a new Order has been promulgated.

In view of his new Report and Order, limiting our activities as a carrier to the handling of freight forwarder business only, we feel justified that the circumstances warrant now fighting for the saving of our limbs (all of the points, places and routes as applied for) as these now, under the changed circumstances, are our very life.

We do not challenge, nor do we complain against, the restriction to serve only freight forwarders. We give up our claims to serve others, painful as this limitation is.

We do challenge the situation whereby we may not serve all of the points and places via the routes that we did for freight forwarders during the "Grandfather" period and continuously since. This painful prospect should be eliminated. Our situation should be relieved. We should be allowed to serve each and every point and place applied for over all of the routes set forth in our application and as proven before the District Supervisor and before the Examiner at the hearing in this Docket.

#### ARGUMENT

At the outset, in view of the final finding of our status by the full Commission, we understand the law to be and the question to be determined in this proceeding:

Whether under the circumstances we are entitled to the right to serve all of the claimed points and places over the routes as applied for, depends on our "holding out" during the "Grandfather" period and continuously since—coupled, and fixed (or defined and modified) by what we actually did as a "Common Carrier in the transportation of commodities which were at the time moving on bills of lading of freight forwarder."

Stated another way: If now, in 1943, the determination is that on June 1, 1935, and continuously since, we were "Com-

474 mon Carriers transporting commodities which were moving on bills of lading of freight forwarders" then the measure of what we are entitled to receive by way of operating authority is: Did we as a carrier accept and transport all of the business that was made available to us by freight forwarders at the points and places claimed by us and did we transport such traffic over the routes as claimed during the critical period?

We say we did, and that we have proven that we did.

At every point and place claimed, our trucks were made available for transportation at all times. The delineated analysis of the proof in the Division 5 Report of August 4, 1943, indicates this beyond doubt. Point by point, city by city, that Report, beginning with the last paragraph on the bottom of sheet 5, thereof, and continuing through the third paragraph on sheet 9, proclaims loudly that, measured——by what freight forwarders made available for transportation——we transported. This, notwithstanding freight forwarders did not always maintain a flow of traffic for us to transport at each point or between each point every day, or every week, or even every month.

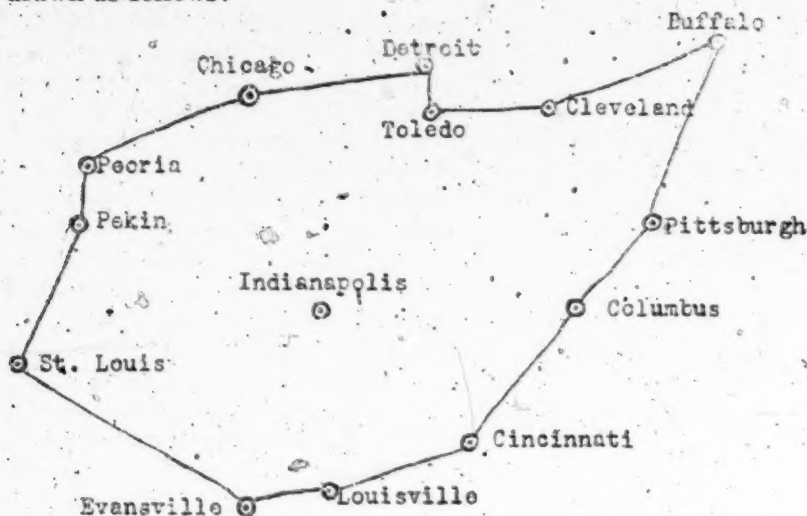
When they did have traffic for us to transport even with breaks in between of half a year or even a year, we were "Johnny on the spot" and we carried out our burden and we did transport. According to Our Holding Out.

It is in this light that our proof must be assayed. Our assumption during the "Grandfather" period was to transport for freight forwarders. That such traffic was not always available; or that freight forwarders did not, for reasons of their own, utilize our facilities as a motor carrier, does not alter the fact that our proof, as made available to the Commission, indicates clearly that when freight forwarders sought to utilize the service which we offered by way of carriage by motor vehicle, we always transported their traffic. We never failed! And this even though very

475 often we had to deadhead our equipment to another city where such traffic was available; and even though on many an occasion our equipment was tied up in a given place for days on end until a load of traffic was made available to us.

Applicant, to protect the situation whereby it was always ready to perform that which it held itself out to do, went to the trouble of having ready State Operating certificates and permits way and beyond the needs (as measured by the grant of authority by Division 5) of its everyday service. Applicant did this to be in a position TO DO what it held itself out to do. The operating authorities from the several states were set out in the "Grandfather" application and are referred to in the Record at the Hearing. (Tr. pp. 363, 364.)

It must be remembered that during the critical period, our position as a carrier for freight forwarder shippers was in flux. That is to say: While we did at certain places maintain a staff and trucks to satisfy sustained operations for steady flows of freight forwarder traffic, yet, our business was such that whenever it was advantageous to the freight forwarder, we were called upon to service other points not as continuous in flow of traffic as other places. And, we did service such traffic, by transporting the same by motor vehicle, if the same originated at a point and was destined to a point within the territory in which we held ourselves out to transport with Indianapolis, Indiana as a focal point. This territory in which we held ourselves out and did actually operate and transport freight forwarder traffic is described in boundaries as follows: Buffalo, N. Y. and Pittsburgh, Pa., in the east; Cleveland and Toledo, Ohio, Detroit, Mich. and 476 Chicago, Ill. on the north; St. Louis, Mo., Pekin and Peoria, Ill. on the west; and Evansville, Ind., Louisville, Ky. and Cincinnati, Ohio, on the south, with service to any and every point and place (over the most convenient routes) within the territory contained within a continuous line drawn on a map from Buffalo, N. Y. through Pittsburgh, Pa., through Cincinnati, Ohio, Louisville, Ky., and Evansville, Ind. through St. Louis, Mo., through Pekin, Peoria and Chicago, Ill. and Detroit, Mich., Toledo, and Cleveland, Ohio, to Buffalo, N. Y., inartistically drawn as follows:



This we actually did. With more or less regularity, depending upon the evenness of available traffic, we served between (to and from) every city contained on and within the territory of the map lines as crudely drawn above.



True, our formal documentary proof does not bear out this assertion in every particular. This lack in formal documentary proof is due to several reasons, amongst which are these:

1. The object of your Applicant at the hearing was to make only a representative showing and for this reason, the exhibits as prepared were intended only to diagram the operations by representative shipments (Tr. pp. 61, 115, 120, 121, and 234).

2. The original books of entry and records of Applicant were brought into the hearing room and were made available for protestors and the Examiner (Tr. pp. 59, 60, 114, 116, 117, 118, 120, 208, 212, 215, 227, 228, 272, 273, 279, and 339).

3. Applicant truly was bewildered (as were many others until the Order of the Commission of August 4, 1943) as to what kind or type of a carrier it was; and what sort of proof to prepare to help the Commission to determine its status (Tr. Docket No. MC-3339, pp. 6 through 29, inclusive) and most important.

4. Prior to the time that any suggestion of the necessity for a formal hearing in this Docket, Mr. Luther Snodgrass, then District Supervisor at Indianapolis for the Bureau of Motor Carriers of the Commission, had spent weeks at Applicant's main office at Indianapolis, Indiana, going over the documents and other records of Applicant to help him in his informal investigation of Applicant's "Grandfather" application. In the course of his investigation, he pulled out and laid aside a great volume of documents and these were all put together into one large pile. The fates and the weather were against us. These produced one of the most devastating and ruinous floods, early in the year 1937.

The flooded White River, which flowed only a very short distance from Applicant's office, caused the sewer in that part of Indianapolis to back up and inundate this pile of documents (amongst other personal property and records) so neatly laid aside by this District Supervisor and which was so vitally important to us as proof at the formal hearing later determined to be necessary by the Commission two years later in 1939. The health authorities required us to haul this material away to be destroyed, which we did (Tr. pp. 56-58, 192, 201, 345). Thus, this valuable documentary aid to our proof was not available at the hearing. It may well be that the substance of its contents can be found in the Commission's confidential files or amongst the records of the local Supervisor at the office of the Bureau of Motor Carriers at Indianapolis.

5. The Record is replete with oral testimony from four witnesses, (drivers, dispatchers, road supervisor, and general manager) backed up by Applicant's original books of entry and

records made available at the hearing (in addition to the map and route breakdown: Exhibits 30 and 31), and closely examined by all of the many counsel appearing for the protestants, showing conclusively that operations were conducted by Applicant way and beyond what was presented in documentary form, to and from and between all points claimed and applied for. (Tr. pp. 78, 113, 115, 133, 135, 140, 142, 147, 155, 156, 160, 168, 177, 196, 198, 202, 203, 204, 225, 228, 229, and 354.) See testimony of Witnesses Kohout, Wilson, Branham and Wilson (Tr. pp. 23-28, 129, 148, 186, 218, 219, and 345).

479 See: Niagara Freight Lines, 6 M. C. C. 585, 587; Durant Transit Company, 7 M. C. C. 264, 265, 266; John Richards, 27 M. C. C. 489, 492, 494.

In addition to Exhibits numbered 30 (map showing operations and routes) and 31 (route breakdowns), Applicant at the hearing introduced thirty (30) separately arranged Exhibits (1-29, 33) showing thereon (in abstract form) actual shipments handled by Applicant during the critical period (supported at the hearing by shipping documents and "original books of entry and records" covering each movement), which Exhibits numbered as set forth hereinbelow, between the points and places indicated, must be read and understood as being INCOMPLETE and as being merely Representative\*\* of that which Applicant did and held itself out to do during the critical period:

See Exhibits:

1. Between Chicago, Illinois and St. Louis, Missouri.
2. Between St. Louis, Missouri and Cincinnati, Ohio.
3. Between Louisville, Kentucky and Cincinnati, Ohio.
4. Between Cincinnati, Ohio and Indianapolis, Indiana.
5. Between Indianapolis, Indiana and Cleveland, Ohio.
6. Between St. Louis, Missouri and Dayton, Ohio.
7. Between Louisville, Kentucky and Indianapolis, Indiana.
8. Between St. Louis, Missouri and Louisville, Kentucky.
9. Between St. Louis, Missouri and Cleveland, Ohio.
10. Between St. Louis, Missouri and Pittsburgh, Pa.
11. Between Indianapolis, Indiana and St. Louis, Missouri.
12. Between Akron, Ohio and St. Louis, Missouri.
13. Between Springfield, Ohio and St. Louis, Missouri.
14. Between Indianapolis, Indiana and Dayton, Ohio.

\*It must be remembered that the original books of entry and other records of Applicant were in the Hearing Room and that these contained proof of additional tens of thousands of shipments handled by Applicant during the critical period. Further, it must be understood that the protestants fine-tooth-combed these books and records. The Examiner and Division 5 apparently ignored the contents of these in their respective determinations.

\*\*Applicant did not prepare more detailed Exhibits because of the shortness of time allowed and because it believed that a showing Representative of its activities was all that was desired by the Commission.

15. Between Indianapolis, Indiana and Toledo, Ohio.
16. Between Indianapolis, Indiana and Detroit, Michigan.
17. Between Pittsburgh, Pa., and Indianapolis, Indiana.
18. Between Louisville, Kentucky and Cleveland, Ohio.
19. Between Louisville, Kentucky and Pittsburgh, Pa.
- 480 20. Between Louisville, Kentucky and Chicago, Illinois.
21. Between Indianapolis, Indiana and Chicago, Illinois.
22. Between Chicago, Illinois and Cincinnati, Ohio.
23. Between Chicago, Illinois and Pittsburgh, Pa.
24. Between Detroit, Michigan and Louisville, Kentucky.
25. Between Dayton, Ohio and Springfield, Ohio.
26. Between Pittsburgh, Pa. and Columbus, Ohio.
27. Between Cleveland, Ohio and Pittsburgh, Pa.
28. Between Columbus, Ohio and St. Louis, Missouri.
29. Between Cleveland, Ohio and Cincinnati, Ohio.
33. Between Buffalo, New York and St. Louis, Missouri.

A careful examination of these Exhibits 1-29, 33, will show clearly that, in addition to the points and places outlined above, these Exhibits showed operations between other places, intermediate, off-route, and ultimate.

Much interrogation by way of direct, cross, redirect and recross examination by Counsel, as well as by the Examiner, was made of each of the witnesses to determine whether each of the routes and each of the points as applied for had actually (on June 1, 1935, and continuously thereafter) been utilized and served. Invariably, the Record will show beyond doubt that EACH point was served and EACH route utilized in such service. (See Transcript, Witnesses: Kohout, Tr. pp. 13, 112, 210, 226, 346, 348, 361, 364, 367; Wilson, 129, 136; Branham, 148, 157, 171, 186; Morris, 186, 189, 192.) The Transcript references at this place are directed to the portions of the Transcript where direct, redirect, cross and recross examination (and the questions of the Examiner) begin. These Transcript page references are so here arranged rather than particular page references for the reason that a full reading of the uncontradicted and unchallenged testimony is necessary (and will easily convince the wary) for an understanding of the clear uncontraverted fact that (so far as the Record goes) Applicant did operate, and should be granted authority for the future, 481 over each and every route, as claimed and applied for, in servicing each and every point and place as claimed and applied for.

We think the determinations of the Commission on different occasions are clear that in the appraisal of rights and routes claimed under a "Grandfather" application authority will be

granted upon a REPRESENTATIVE showing aided by oral testimony.\*

Union Transfer Co., 19 M. C. C. 569, 661, 662.

From the earliest days, it has been clear that a showing of service to principal points is sufficient to warrant the grant of intermediate points on oral testimony: Midland Truck Lines, Inc., 3 M. C. C. 352, 554; Nevitte Com. Car. Application, 4 M. C. C. 298, 299-300; Niagara Freight Lines, 6 M. C. C. 585, 587; Mercury Motors, Inc., 7 M. C. C. 557, 558-559; Durant Transit Company, 7 M. C. C. 264, 265, 266.

While it is true that the Commission does not weigh too heavily an asserted "holding out"—there are special cases (and we believe the instant situation is a "Special case") where the facts and circumstances warrant a modification (relaxation) of the usual determination. In the case of "Warren Trucking Company (No. MC-9914, Common Carrier Application) 3 F. C. C. —," this was clearly established. We quote at length from that decision:

482 "As protestants point out, we have repeatedly refused to attach much weight in a 'grandfather' proceeding to a mere holding out without some evidence of actual service consistent therewith. In instances such as the one here considered, however, where the holding out for the return movement is so definitely and obviously a part of the holding out for the out-bound movement, we feel warranted in considering the holding out for the return movement as being modified not by the actual service performed on the return movement only, but rather by the service as a whole, including the out-bound movement. Such considerations, of course, are not applicable in every case but appear to be appropriate here where the great bulk of applicant's service has been and will be performed for a single manufacturer [freight forwarder] who has relied upon applicant almost exclusively for a complete truck service. We conclude, therefore, that applicant has established 'grandfather' rights for the return movement of materials used in the manufacture of new furniture in connection with its outbound movement of the finished products."

\*Although Division 5, in its Report of October 7, 1942, and the full Commission in the Report herein complained, gave no weight to the oral testimony showing operations for shippers other than the Universal Carloading and Distributing Corporation, the Record on the Hearing, repeatedly, throughout its 379 pages, time and again discloses testimony (oral and not documentary except Exhibits 30 and 31) showing operations for at least twenty additional shippers. (Tr. pp. 49, 138, 193, 326, 327, 328 and 351.)

The object of Applicant, at this point, in pointing this out, is twofold: (1) Time and again points and places (not granted by Division 5) are mentioned (and uncontroverted in the Record) as having been served during all of the critical period (Tr. pp. 78, 113, 117, 133, 135, 140, 142, 147, 155, 156, 160, 168, 177, 196, 198, 202, 203, 204, 225, 228, 229, and 354); and (2) we deem this to have weight and probative value to emphasize Applicant's operations and their comprehensive coverage by actual operations to all points and places over all routes as applied for

\*Bracketed words, thus [freight forwarder], are our insertion.

Likewise in a contract carrier case (which we believe is congruously analagous to our situation) a rule was stated which should be governing in the instant situation. We quote from the decision in the case of John R. Callahan (No. MC-47693, Contract Carrier Application) 3 F. C. C. —:

"This leaves in issue applicant's claim of a "grandfather" right to serve the remaining 15 destinations which he contractually undertook to serve, but did not actually serve, prior to the statutory date. The answer depends on whether the actual physical operation performed by applicant since prior to the statutory date has been consistent with, and, in a broad sense, coextensive with, the extent of his obligation under the contract. In other words, considering the 30 destinations named in the contract as a group comprising the territory served, the question arises whether the 15 destinations actually served are so located in that territory as to warrant the conclusion that applicant was rendering a good-faith service on July 1, 1935, to the entire group as a unit, and, if not, to what particular destinations or what part of the group he was giving such a service. *We do not require proof of actual operation to every point within a claimed territory but only proof of operation consistent with the applicant's undertaking or obligation under the contract.* In this connection, it must be noted that the opportunity for service and the frequency of service to particular points in a contract carrier case necessarily depends upon the

483 volume and scope of the shipper's business which naturally will fluctuate from time to time. As seen, applicant actually served 15 destinations in West Virginia, Virginia, and Maryland prior to July 1, 1935, and in the natural course of the shipper's business, he was called on to serve 15 additional destinations in these States subsequent to that date. This he did in fulfillment of his undertaking under his contract with the shipper. If we can say that applicant's actual operation to the 15 points prior to July 1, 1935, constituted a substantial and continuing service to the territory covered by the contract, or to the points named therein as a group and that his operation subsequent to July 1, 1935, was merely a continuation of service to additional points "within the territory" or group, then we should find that applicant was in bona fide operation on the statutory date to the territory covered by his contractual undertaking with the shipper." [Italics supplied.]

Applicant's operation must be determined upon the same basis as the Commission considered in the following cases:

John Richards, 27 M. C. C. 489.

Clarence Tarbet, 6 M. C. C. 325.

Gas City Transfer Company (MC-8540), decided Feb. 21, 1942.



Thomas Truck Co., Inc. (MC-4638), decided July 10, 1940.

LeCrone Transport Line, Inc., 30 M. C. C. 641.

Transamerican Freight Lines, Inc., 28 M. C. C. 493.

H. L. Anderson (MC-3127), decided Dec. 6, 1941.

In none of the above cases did the Commission assay the proof in a narrow application; rather, in each of the above cases the Commission understood that the documentary proof was merely a representative showing; that some points served indicated the right to serve other points—upon the basis of holding out backed up by some service. We are in like situation and our authority should not be too narrowly confined.

Published cases corroborative of Applicant's claims are numerous. We will not burden with further citation and quotation from decided cases. We assert our position is of virtue and 484 that a fair appraisal of the analysis of the Documentary proof introduced at the Hearing and as set out in the Report of Division 5, in this case, under date of October 7, 1942, should convince the Commission in the Reconsideration that Applicant, who is adjudged in 1943, to have been in 1935, and since, a carrier for freight forwarders only—should be granted the rights applied for (routes and points and places) on the basis of its Holding Out and the Actual Service performed by it in pursuance of its holding out.

In appraising this proof and in evaluating its weight, we pray, urgently and sincerely, that the Commission determine whether in an operation as far-flung in territory as is—and was—this operation, it is conceivable that a carrier would have to go to a dead-end city like Pittsburgh, or Cincinnati, or Louisville, or Chicago, or Detroit, or Buffalo, not to mention other cities within the territory served, like: Cleveland, Akron, Toledo, Dayton, Indianapolis, amongst others, without hope of getting a return load, or for a Load to cities or places other than those specifically (by very, very narrow construction) authorized by the Order of Division 5.

Too, in appraising the documentary proof, we pray and urgently request the Commission in this Reconsideration to give weight to the oral testimony (which we regard as proof) of Witnesses Kohout, Van Tassel, Wilson, Branham, and Morris, respectively. Kohout, the General Manager of Applicant, who was first a driver, divisional superintendent, and road supervisor; Van Tassel, the General Traffic Manager for the Universal Carloading and Distributing Company; Wilson, driver, terminal manager, road supervisor for Applicant; Branham, driver and terminal manager for Applicant; Morris, driver, all persons in a position to know and Describe Applicant's operations.

As urgently, and with all the sincerity that we can  
 485 command, we pray, that in so appraising and evaluating of  
 Applicant's proof in this Reconsideration, the Commission  
 consider that Applicant held itself out to do and did that which  
 was best suited for the freight forwarder. When, (for whatever  
 reason) the freight forwarder failed to load our trucks at a given  
 place, or at a given time, or even for a given period, there was  
 very little that we could do about it. We either dead-headed to  
 the closest place (within the territory) or waited until a load to  
 another place (within the territory) was available to us, or we  
 submitted to an arrangement where for a period we hauled to one  
 place, dead-headed to another (hauled and dead-headed inter-  
 mittently), until pay loads were available at freight forwarders  
 need within the territory, bounded and described, *supra*, page 7,  
 of this motion and brief.

For convenience, we set forth hereinbelow the analysis of the  
 documentary proof only as contained in the Report of Division 5,  
 under date of October 7, 1942:

NOTE.—It must be remembered in reading the hereinbelow por-  
 tion of the Division 5 Report, that the Hearing was held in No-  
 vember 1939, and all documentary proof, necessarily, had to bear  
 an earlier date.

"Akron-St. Louis. The documentary evidence submitted dis-  
 closes one shipment on May 28, 1935, from St. Louis to Akron,  
 none from that date to May 18, 1936, and from the latter date to  
 December 31, 1938, there were numerous shipments. No ship-  
 ments are shown from December 31, 1938, to the date of the hear-  
 ing in November 1939. It is apparent that if a service from St.  
 Louis to Akron can be said to have existed on the statutory date,  
 it was abandoned on December 31, 1938. With respect to service  
 in the opposite direction, the documentary evidence shows that  
 applicant has operated from Akron to St. Louis continuously  
 since a date prior to June 1, 1935, and is entitled to continue that  
 service. [Italics supplied.]

"Akron-Cleveland. On the claimed operation from Akron to  
 Cleveland, there was shown only one shipment which moved Jan-  
 uary 24, 1937. In the reverse direction, numerous shipments were  
 made from March 8, 1934, to April 4, 1935, but the record does  
 not show that there were any shipments after the latter date  
 except for two in 1939, one on January 12, and the other on June  
 12. The evidence is not sufficient to justify the granting of  
 authority sought between Akron and Cleveland. [Italics sup-  
 plied.]

486 "Akron-Chicago. There were shown four shipments  
 only, from Chicago to Akron, three of those in No-  
 vember 1936 and the other September 3, 1938. The first ship-

ment shown from Akron to Chicago was on April 8, 1936, with six others during 1936, five during 1937, numerous others during 1938, and eight during the first half of 1939. The evidence of operation between Chicago and Akron showing no service at all prior to June 1, 1935, is not sufficient to prove "grandfather" rights between those points over the routes claimed. [Italics supplied.]

"Akron-Buffalo. As to the claimed operation from Akron to Buffalo, N. Y., there were shown three shipments in 1938, two shipments in 1939, and in the reverse direction two only, in 1938, one on February 24 and the other on March 3. This showing is not sufficient to prove a "grandfather" operation between these points. [Italics supplied.]

"St. Louis-Springfield. There is no documentary evidence indicating any operation from St. Louis to Springfield, Ohio. The operation in the reverse direction from Springfield to St. Louis was instituted prior to June 1, 1935, and continued rather consistently until July 31, 1936. From the latter date to September 27, 1937, no service is shown. After September 27 there were nine shipments in 1937, 20 in 1938, and three in 1939, one on January 3, one on February 25, and the other on March 1. Most of the period in 1937 as to which there is no documentary evidence was after the flood that destroyed a portion of applicant's records. No explanation was made of the failure to show any shipments moved after March 1, 1939. Applicant has failed to establish an operation between St. Louis and Springfield, over the routes claimed. [Italics supplied.]

"Dayton-Indianapolis. No documentary evidence was submitted to show an operation from Dayton to Indianapolis. In the opposite direction there were shown two shipments in 1935; none in 1936; a substantial number in 1937; two in December 1938; and one on February 6, 1939. This showing suggests a virtual cessation of operation over this route and is not sufficient to establish the routes claimed between Indianapolis and Dayton. [Italics supplied.]

"Indianapolis-Toledo. The operation between Indianapolis and Toledo was instituted prior to June 1, 1935, but no service from Toledo to Indianapolis is shown after September 27, 1937, and none in the opposite direction after October 1, 1937. Applicant has failed to establish the rights sought between these points. [Italics supplied.]

"St. Louis-Toledo. The operation between St. Louis and Toledo was begun prior to the statutory date, but no service is shown from St. Louis to Toledo from September 11, 1935 to August 14, 1937; none in 1938; and only one shipment in 1939. No service was rendered from Toledo to St. Louis during 1937; there were

two shipments in 1938, and two in 1939. No operating rights have been established between these points over the routes claimed: [Italics supplied.]

"Indianapolis-Detroit. The record shows *three shipments in May 1934*, one in August, one in September, and one on November 15, 1934, but there is no documentary evidence of operation from Detroit to Indianapolis from November 15, 1934 to May 16, 1936. *Quite a volume of shipments continuously since the latter date are shown.* It thus appears that there was no operation on the statutory date. Even if consideration be given to the operation prior to November 1934 the cessation in such service for approximately 19 months must be considered an abandonment thereof. [Italics supplied.]

"With respect to service in the opposite direction, there were nine shipments during 1935, some of them prior to June 1, and considerably more during each of the subsequent years. The evidence submitted is deemed sufficient proof that *applicant has operated from Indianapolis to Detroit since prior to June 1, 1935.* [Italics supplied.]

"Indianapolis-Pittsburgh. *Operation from Pittsburgh, Pa. to Indianapolis was instituted on May 3, 1935, and there was a regular movement until June 17, 1938, at which time the service in that direction appears to have been abandoned, as there is no evidence of operation since that time. However, the evidence presents a different picture with respect to service from Indianapolis to Pittsburgh. It was begun in May 1935 and has been continuous since.* [Italics supplied.]

"Louisville-Cleveland. The record shows numerous shipments from Louisville to Cleveland from May 1, 1935, to December 31, 1935, two in January, one in February, one on April 8, 1937, and none from the latter date to February 10, 1939, a cessation of operation for 22 months. *Numerous shipments were made from Cleveland to Louisville from May 1, 1935 to November 30, 1937, but the record does not show any shipments after the latter date except one on August 14, 1939.* No rights between these points can properly be granted on the present record. [Italics supplied.]

"Louisville-Pittsburgh. The documentary evidence submitted, which need not be reviewed, shows that applicant is entitled to continue the operations between Louisville and Pittsburgh.

"Pittsburgh-Cincinnati. *The operation between Pittsburgh and Cincinnati was instituted on July 14, 1936, in one direction, and in the opposite direction on July 15, 1936, or more than 13 months after the statutory date.* The evidence will not support a finding that applicant is entitled to authority to operate between Pittsburgh and Cincinnati. [Italics supplied.]



488 "Louisville-Chicago; Indianapolis-Chicago; Cincinnati-Chicago. No exceptions were filed to that portion of the examiner's recommended order which proposed a grant of operating authority between these points. They need not be discussed in detail. Authority will be granted between these points.

"Chicago-Pittsburgh. According to the documentary evidence submitted in support of the operation from Pittsburgh to Chicago, *the service commenced prior to June 1, 1935, was abandoned from April 18, 1936 to September 2, 1937, both inclusive.* Service in the opposite direction has been continuous since prior to the statutory date. Applicant is entitled to continue operation from Chicago to Pittsburgh. [Italics supplied.]

"Detroit-Louisville. There is also ample proof which need not be described in detail that applicant is entitled to continue operating between Detroit and Louisville.

"Dayton-Springfield. The evidence shows conclusively that on April 29, 1938, applicant abandoned *an operation begun prior to June 1, 1935, from Dayton to Springfield.* Service in the reverse direction was discontinued on April 1, 1938. Applicant has failed to establish a right to operate between these points. [Italics supplied.]

"Columbus-Pittsburgh. There is no documentary evidence of operation from Columbus to Pittsburgh. In the reverse direction there were *seven shipments in 1935; three shipments in 1936; three shipments in 1937; none in 1938, and only one in 1939.* Having in mind the importance of these points, the meager service shown is not sufficient to warrant a finding of a bona fide operation on and continuously since June 1, 1935. [Italics supplied.]

"Cleveland-Pittsburgh. No documentary proof was offered with respect to service from Pittsburgh to Cleveland. *There is satisfactory proof, however, with respect to the operation from Cleveland to Pittsburgh.* [Italics supplied.]

"Columbus-St. Louis. Evidence of operation from Columbus to St. Louis shows *one shipment on March 2, 1935, none in 1936, nine in 1937, and 17 in 1938,* but no evidence was submitted to show an operation after December 16, 1938. The record does not show any evidence of operation from St. Louis to Columbus. On the present record no authority can properly be granted between these points. [Italics supplied.]

"Cleveland-Cincinnati. The evidence shows *two shipments in 1934 from Cleveland to Cincinnati, three in October and November 1935, 10 in 1936, two in 1937, five in 1938, and one on January 28, 1939.* No evidence was submitted to show an operation in the reverse direction. Applicant, however, has not sub-



489 mitted sufficient proof to show continuous operation between these points over the routes claimed. [Italics supplied.]

"Buffalo-Pittsburgh." Applicant did not submit any documentary evidence in support of a claimed route between Buffalo and Pittsburgh and it does not appear to be entitled to authority to operate between these points over the route described in appendix A. \*Pittsburgh Flood (Tr. p. 339); Examiners check, destruction of Records (Tr. pp. 23-28, 129, 148, 186, 218, 219 and 345); see also; Buffalo-St. Louis, *infra*.

"Buffalo-St. Louis." The first operation between Buffalo and St. Louis shown by any documentary evidence was on June 27, 1936, and there has been a continuous operation since that time. However, the general traffic manager of Universal who has been with the company since December 1, 1918, was positive that service has been rendered by applicant between Buffalo and St. Louis since September 1921, at which time Universal opened its office in East St. Louis. Daily service is provided between these points. The operation will be authorized between these points.

"Buffalo-Chicago." No documentary evidence was submitted in support of a claimed operation over specified routes between Buffalo and Chicago, consequently no authority can be granted between these points. See note \*Buffalo-Pittsburgh, *Supra*.

"Buffalo-Indianapolis." Both parol and documentary evidence show that the operation between Buffalo and Indianapolis also was commenced in September 1934. No interruption appears and the operation will be authorized.

"Louisville-Buffalo." There was no documentary evidence nor definite and specific oral testimony to support the claimed operation between Louisville and Buffalo. No authority can be granted to operate between these points." See note \*Buffalo-Pittsburgh, *supra*.

Between the floods at Pittsburgh in 1936, at Cincinnati in 1936 and 1937, and at Indianapolis in 1937, with the resultant destruction of records, together with the inadequate provisions for preservation of records (a common characteristic of all carriers, no less Applicant in the early years) much could not be proven. For example: Very few shipping documents were available to show the operations in and to and from Buffalo and other points. Yet everybody connected with the operation (Globe Employees and Universal employees) knew that almost daily operations were conducted between practically all the cities served and

490 Buffalo. This same condition prevailed with Detroit, Mich., Pittsburgh and Erie, Pa., Cleveland, Akron, Toledo, Cincinnati, Dayton, Columbus and Springfield, Ohio; Indianapolis (the main operating point), Muncie, Lawrenceburg and

Evansville, Indiana; Pekin, Peoria, Alton, East St. Louis, and Chicago, Illinois; and Louisville, Ky.

We believe that no question can exist that operations actually were conducted by Applicant between all points and places, over all the routes within the territory, as applied for.

For emphasis and explanation: We have bounded and described, and throughout this document, have adverted to a territory. Actually this was a territorial operation (Tr. pp. 194; 195) with operation between all the points (ultimate, off-route and intermediate) within the territory, especially between: Indianapolis, Indiana; Muncie, Indiana; Lawrenceburg, Indiana; Evansville, Indiana; Chicago, Illinois; Alton, Illinois; Peoria, Illinois; Pekin, Illinois; E. St. Louis, Illinois; St. Louis, Missouri; Akron, Ohio; Cleveland, Ohio; Toledo, Ohio; Columbus, Ohio; Springfield, Ohio; Dayton, Ohio; Cincinnati, Ohio; Pittsburgh, Pennsylvania; Erie, Pennsylvania; Detroit, Michigan; Louisville, Kentucky; Buffalo, New York.

This was not a to and from operation, except, only, as 491 freight forwarder traffic, for a time only, made it so. It was always a between operation serving between all of the points named above.

Our view is that this operation could very well be granted as a territorial operation. We believe that the Commission could very well and consistently determine that Applicant's operation on June 1, 1935 and since, was and is that of a Common Carrier, territorial in scope, limited to the transportation of general commodities (except commodities in bulk and those of unusual length, height or weight) which are at the time moving on bills of lading of freight forwarders.

To maintain our very life as a carrier, as a minimum, in view of the curtailment and limitation to the hauling for freight forwarders only, we believe that we are entitled to no less than the right to use all convenient routes (as set forth in our Exhibits 30 and 31, at the hearing) in serving between each and every one of the following cities: Indianapolis, Muncie, Lawrenceburg and Evansville, Indiana; Chicago, Alton, Peoria, Pekin and East St. Louis, Illinois; St. Louis, Missouri; Akron, Cleveland, Toledo, Columbus, Springfield, Dayton and Cincinnati, Ohio; Pittsburgh and Erie, Pa.; Detroit, Michigan; Louisville, Kentucky and Buffalo, New York.

Wherefore the premises considered:

Hancock Truck Lines, Inc. Applicant by succession (Dockets No. MC-E-1743 and MC-25567, Sub. No. 8) to the "Grandfather" rights of Globe Cartage Company, Inc. (Docket No. MC-3339), respectfully prays the Honorable, the Interstate Commerce Commission to reconsider so much of its Report and Order of August 4,

1943, as does not grant the right in Applicant to serve all the points and places as applied for, using all of the routes in the service of all such points and places as applied for, in Applicant's "Grandfather" application (on Form B. M. C. 1), and, upon reconsideration, Applicant further prays that the Honorable, the Interstate Commerce Commission authorize issue and grant unto Applicant a Certificate of Convenience and Necessity as a Common Carrier of general commodities (except commodities in bulk and those of unusual length, height or weight) which are at the time moving on bills of lading of freight forwarders, and authorizing service, between all of the points and places as applied for over all of the routes as applied for as described and set forth in the "Grandfather" application (Form B. M. C. 1) seasonably filed and docketed as MC-3339 (now MC-25567, Sub. No. 8), and for all other and proper relief in the premises.

Respectfully submitted.

HANCOCK TRUCK LINES, INC.,

By JACOB WEISS,

Jacob Weiss, *Its Counsel*,

512 Insurance Building, 8 East Market Street,

Indianapolis, Indiana.

Dated at Indianapolis, Indiana, October 29, 1943.

#### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each.

Dated at Indianapolis, Indiana, this 29th day of October 1943.

JACOB WEISS.

Jacob Weiss.

493 [Clerk's certificate to foregoing transcript omitted in  
printing.]

494 In the Supreme Court of the United States

October Term, 1944.

No. 448

Statement of points to be relied upon and designation of parts  
of record to be printed

Filed Oct. 2, 1944

Appellants, United States of America and Interstate Commerce Commission, pursuant to Rule 13, paragraph 9, state that the

points on which they intend to rely are all those set forth in their assignment of errors heretofore filed, and designate for printing as necessary to the consideration of the case the entire record as certified and transmitted by the Clerk of the District Court.

CHARLES FAHY,

Charles Fahy,

*Solicitor General.*

WENDELL BERGE,

per R. L. P.

Wendell Berge,

*Assistant Attorney General.*

EDWARD DUMBAULD,

per R. L. P.

Edward Dumbauld,

*Special Assistant to the Attorney General.*

DANIEL W. KNOWLTON,

Daniel W. Knowlton,

*Chief Counsel, Interstate Commerce Commission.*

NELSON THOMAS,

Nelson Thomas,

*Attorney, Interstate Commerce Commission.*

495 Receipt of copy of the foregoing statement of points to be relied upon and designation of parts of record to be printed acknowledged this — day of —, 1944.

JACOB WEISS,

8 East Market St., No. 512,

ALBERT WARD,

8 East Market St., No. 318,

FERDINAND BORN,

718 Chamber of Commerce Bldg.,

Ill of Indianapolis, Indiana,

*Attorneys for Appellee, Hancock Truck Lines, Inc.*

[File endorsement omitted.]

496 In the Supreme Court of the United States

October Term, 1944

No. 449

*Statement of points to be relied upon and designation of parts of record to be printed*

Filed Sept. 20, 1944

Appellant, Regular Common Carrier Conference of American Trucking Associations, Inc., herewith submits to the Clerk of the

Supreme Court of the United States its Statement of Points to be Relied Upon, and Designation of Parts of Record to be Printed, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States.

POINTS TO BE RELIED UPON

1. The facts of record before the Interstate Commerce Commission in the matter of the Application of Globe Cartage Company, Docket No. MC-3339 fully sustain the findings made and the order entered by the Interstate Commerce Commission in said matter, which said order is the subject of complaint in Plaintiff-Appellee's petition.

2. The findings and order of Division 4 of the Interstate Commerce Commission in Interstate Commerce Commission Docket No. MC-F-1743, being the acquisition matter wherein plaintiff acquired the operating rights of Globe Cartage Company were not conclusive and binding upon the Interstate Commerce Commission in its determination of the Globe Cartage operating rights, and such findings and order of the Interstate Commerce Commission in its Docket No. MC-F-1743 could not in law constitute a determination of the "grandfather rights" which plaintiff acquired by its purchase of Globe Cartage Company.

487 (a) Findings and orders of Division 4 of the Interstate Commerce Commission are entered pursuant to Section 5 of the Interstate Commerce Act and determine solely the question whether a transfer of operating rights is consistent with the public interest, whereas the determination of "grandfather rights" is made pursuant to the provisions of Section 206 (a) of the Interstate Commerce Act.

(b) Estoppel cannot be asserted as a defense against either the United States or the Interstate Commerce Commission.

3. The Interstate Commerce has the authority, pursuant to the provisions of Part II of the Interstate Commerce Act, to issue a Certificate of Public Convenience and Necessity imposing or placing thereon in a proper case restrictions that limit the carrier to the transportation of "general commodities which are at the time moving on bills of lading of freight forwarders."

(a) The placing of such limitation or restriction on the certificate in the instant case is not a denial of due process of law.

(b) Such restriction is not inconsistent with plaintiff's status as a common carrier.

(c) Plaintiff could not acquire by purchase any greater operating authority than its predecessor was entitled to.

4. The court below exceeded its jurisdiction in substituting its judgment for that of the Interstate Commerce Commission in its finding and order in that



(a) Said Court did not remand said matter to the Interstate Commerce Commission for further proceedings.

(b) Said Court made findings of fact and conclusions of law contrary to the record, made before the Interstate Commerce Commission.

PARTS OF THE RECORD TO BE PRINTED

1. Plaintiff's complaint, with Exhibits A, B, C, and D thereto.
2. Answer of defendant United States.
3. Answer of defendant Interstate Commerce Commission.
- 498 4. Plaintiff's reply to paragraph X of answer of defendant Interstate Commerce Commission.
5. Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., for leave to intervene and become a party defendant in the above-styled proceeding.
6. Order of April 8, 1944, allowing the above-mentioned intervention, the recording of the filing of plaintiff's reply to paragraph X of the answer of the Interstate Commerce Commission, and the hearing and submission of the case.
7. Proposed findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission (but refused and not given by the court).
8. Findings of fact and conclusions of law submitted by the plaintiff and given by the court.
9. Final decree of May 25, 1944.
10. All exhibits offered at the hearing by plaintiff and admitted in evidence by the court.
11. All exhibits offered by defendants and admitted in evidence by the court.
12. Petition of defendants United States and Interstate Commerce Commission for appeal and petition of intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc. for appeal.
13. Assignment of errors filed by defendants United States and Interstate Commerce Commission and assignment of errors filed by intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc.
14. Statement as to jurisdiction submitted by defendants United States and Interstate Commerce Commission and by intervening defendant, Regular Common Carrier Conference of American Trucking Associations, Inc.
15. Orders allowing appeal.
16. Notices pursuant to Rule 12 of the Supreme Court and proof of service thereof.

- 499 17. Citations on appeal and proof of service thereof.  
18. Notices to the Attorney General of the State of Indiana and proof of service thereof.  
19. This praecipe and any other supplemental praecipe or counterpraecipe which may be filed herein.  
20. The Clerk's certificate.

B. W. LA TOURETTE,  
B. W. La Tourette,  
GREGORY M. REBMAN,  
Gregory M. Rebman,

818 Olive Street, St. Louis, Missouri,  
*Attorneys for Regular Common Carrier Conference of  
American Trucking Associations, Inc., Appellant.*

HOWELL ELLIS,  
Howell Ellis,  
520 Illinois Building, Indianapolis, Indiana,  
*Local Counsel.*

Receipt of copy of Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed acknowledged this 18th day of September 1944.

FERDINAND BORN,  
By ANNA TOTTEN,  
*Attorneys for Hancock Truck Lines, Inc.*

[File endorsement omitted.]

500 In the Supreme Court of the United States

October Term, 1944

*Stipulation regarding printing of record*

Filed Dec. 12, 1944

It is hereby stipulated and agreed, by and on behalf of all parties to the above-styled cause, that in printing the record the Clerk of the Supreme Court may omit Exhibits "E" and "G," being pages 256 through 420, both inclusive, of the transcript as certified by the Clerk of the District Court, said exhibits containing the applications of Globe Cartage Company, Inc., to the Interstate Commerce Commission in Docket No. MC-3339 and 3340, together with certain orders of the Interstate Commerce Commission.

It is further stipulated and agreed that any of the aforesaid parties may refer to any portion of said Exhibits "E" and "G" in brief or argument.

501

CHARLES FAHY,  
Charles Fahy,

*Solicitor General.*

WENDELL BERGE,  
Wendell Berge,

*Assistant Attorney General.*

ROBERT L. PIERCE,  
Robert L. Pierce,

EDWARD DUMBAULD,  
Edward Dumbauld,

*Special Assistants to the Attorney General.*

DANIEL W. KNOWLTON,  
Daniel W. Knowlton,

*Chief Counsel,  
Interstate Commerce Commission.*

NELSON THOMAS,  
Nelson Thomas,

*Attorney for Interstate Commerce Commission.*

B. W. LA TOURETTE,  
B. W. La Tourette,

GREGORY M. REBMAN,  
Gregory M. Rebman,

HOWELL ELLIS,  
Howell Ellis,

*Attorneys for Regular Common Carrier Conference  
of the American Trucking Associations, Inc.*

JACOB WEISS,  
Jacob Weiss,

ALBERT WARD,  
Albert Ward,

FERDINAND BORN,  
Ferdinand Born,

*Attorneys for Appellee.*

DECEMBER 1944.

[File endorsement omitted.]

No. 448 and 449, October Term, 1944

*Order postponing further consideration of the question of jurisdiction*

November 6, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

[Endorsement on cover:] Enter the Attorney General. File No. 48901, 48902. S. Indiana, D. C. U. S. Term No. 448. The United States of America and Interstate Commerce Commission, Appellants vs. Hancock Truck Lines, Inc. Term No. 449. Regular Common Carriers Conference of the American Trucking Associations, Inc., Appellant vs. Hancock Truck Lines, Inc. Filed September 9, 1944. Term No. 448 O. T. 1944, 449 O. T. 1944.







FILE COPY

Office of the Clerk, U. S.

SEP 9 1944

CHARLES ELMER SHEPLEY  
CLERK

No. 448

*In the Supreme Court of the United States*

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

vs.

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF INDIANA

STATEMENT OF JURISDICTION



**In the District Court of the United States  
for the Southern District of Indiana,  
Indianapolis Division**

Civil Action No. 795

HANCOCK TRUCK LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, DEFENDANTS

*JURISDICTIONAL STATEMENT BY THE DEFENDANT-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES*

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

**A. STATUTORY PROVISIONS**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March

3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

**B. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED**

The decree sought to be reviewed was entered on May 25, 1944. The petition for appeal was presented and allowed on 1944, and an assignment of errors filed.

**C. NATURE OF CAUSE AND OF RULINGS BELOW**

This is an appeal from a final decree of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, entered May 25, 1944, declaring illegal and void an order of the Interstate Commerce Commission made August 4, 1943, in *Globe Cart*



*age Co., Inc. Common Carrier Application*, No. MC-3339, as issued, enjoining the enforcement of an integral portion of said order, viz., the portion thereof requiring that the general commodities to be carried under authority of said order be such as are moving under bills of lading of a freight forwarder. The report made by the entire Commission on reconsideration, found upon substantial evidence that on the "grandfather" date, June 1, 1935, and continuously thereafter, the applicant carried only commodities which were moving upon bills of lading issued by freight forwarders. The Commission's order authorizes the applicant (to which the plaintiff is successor) to operate over certain routes described in said report (which are not in issue in this case) as a common carrier of general commodities which are moving under bills of lading of freight forwarders. A copy of the Commission's said report and order of August 4, 1943, is hereto attached.

The plaintiff as successor in interest to the applicant aforesaid in its complaint contended that since the Commission had found the applicant to be a common carrier it could not lawfully specify that the Globe could haul only commodities moving on bills of lading issued by forwarders even though the evidence showed that this was the only kind of operation the Globe carried on during the "grandfather" period. The Court rendered no opinion, but made findings of fact

and conclusions of law, a copy of which is attached hereto.

The questions presented by this appeal are substantial. They involve the interpretation and application of sections 5, 203, 204, 206, 208 of the Interstate Commerce Act, relating to the scope of the authority of the Commission to specify the character of common carrier operations carried on under a "grandfather" certificate. The action of the court appears contrary to the well-established principle that the operations authorized under a "grandfather" certificate should be such as to assure a substantial parity between applicant's future operations and those carried on bona fide by the applicant on the "grandfather" date and subsequently thereafter.

**D. CASES SUSTAINING THE SUPREME COURT'S  
JURISDICTION ON APPEAL**

*United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475.

*Alton Railroad Co. v. United States*, 315 U. S. 15.

*Noble v. United States*, 319 U. S. 88.

*Crescent Express Lines v. United States*, 320 U. S. 401.

*Board of Trade of Kansas City v. United States*, 314 U. S. 534.

*Union Stock Yard Co. v. United States*, 308 U. S. 213.

*United States v. Pan American Petroleum Corp.*, 304 U. S. 156.

*United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402.

*United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

*Mississippi Valley Barge Co. v. United States*, 292 U. S. 282.

*Florida v. United States*, 292 U. S. 1.

*Tagg Bros. & Moorhead v. United States*, 280 U. S. 420.

*Assigned Car Cases*, 274 U. S. 564.

*Virginian Ry. v. United States*, 272 U. S. 658.

*Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268.

*Texas & Pacific Ry. Co. v. United States*, 162 U. S. 197.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated ———, 1944.

✓ CHARLES FAHY,

*Solicitor General.*

WENDELL BERGE,

*Assistant Attorney General.*

✓ ROBERT L. PIERCE,

*Special Assistant to the Attorney General.*

✓ EDWARD DUMBAULD,

*Special Assistant to the Attorney General.*

DANIEL W. KNOWLTON,

*Chief Counsel.*

NELSON THOMAS,

*Attorney, Interstate Commerce Commission.*

M-6456

## INTERSTATE COMMERCE COMMISSION

No. MC-3339<sup>1</sup>GLOBE CARTAGE COMPANY, INC., COMMON CARRIER  
APPLICATION*Decided August 4, 1943*

On reconsideration, findings in prior reports, 41 M. C. C. 313 and 41 M. C. C. 303, modified. Applicants found entitled to authority to continue operations as common carriers by motor vehicle of general commodities with certain exceptions, between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, and Pennsylvania, over regular routes, in the transportation of commodities which are moving on bills of lading of freight forwarders. Issuance of certificates approved upon compliance by applicants with certain conditions, and applications in all other respects denied.

Appearances as shown in prior reports with addition of *Ezra Weiss* for applicant and *Robert J. McBride* and *J. Mantey Head* for intervener in Nos. MC-3339 and MC-3340.

REPORT OF THE COMMISSION ON RECONSIDERATION  
BY THE COMMISSION:

In the prior report in Nos. MC-3339 and MC-3340, 41 M. C. C. 313, division 5 found applicant, hereafter referred to as Globe, entitled to a

<sup>1</sup> This report also embraces No. MC-3340, Globe Cartage Company, Inc., Contract Carrier Application; No. MC-70614, The Barnett Trucking Company Common Carrier Application; and No. MC-23458, The Barnett Trucking Company Contract Carrier Application.

"grandfather" certificate authorizing continuance of operations as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities, over specified regular routes, between, or from and to, specified points in the territory extending from St. Louis, Mo., on the west, to Buffalo, N. Y., and Pittsburgh, Pa., on the east, and from Louisville, Ky., on the south, to Chicago, Ill., on the north. The applications were in all other respects denied.

In the prior report in Nos. MC-70614 and MC-23458, *Barnett Trucking Co., Common Carrier Application*, 41 M. C. C. 303, division 5 found applicant, hereafter referred to as Barnett, entitled to a "grandfather" certificate authorizing continuance of operations as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over a specified route between Pittsburgh and Cincinnati, Ohio, serving Columbus and Dayton, Ohio, as intermediate points. The applications were in all other respects denied.

Intervener, The Regular Common Carrier Conference of The American Trucking Associations, Inc., and numerous rail and motor-carrier protestants filed petitions for reconsideration in Nos. MC-3339 and MC-3340. One of the petitions seeks oral argument. Applicant and a number of motor-carrier interveners filed petitions for reconsideration and oral argument in Nos. MC-70614 and MC-23458. All of the protestants and interveners urge that division 5 erred in failing "to restrict the authority" granted to applicants to traffic which is, at the time of transportation by them, in the primary custody of and moving



on bills of lading of freight forwarders, as defined in section 402 (a) (5) of part IV of the Interstate Commerce Act. Certain protestants in Nos. MC-3339 and MC-3340 urge that division 5 erred in failing "to restrict and limit" the authority granted to Globe to traffic which is in the primary custody of and moving on bills of lading of Universal Carloading & Distributing Company, and "to truckload movements only." Neither protestants nor interveners question applicants' rights to authority to continue operations as motor carriers of general commodities between the points and over the routes specified in the prior reports. In its petition, Barnett urges that it is entitled to authority to serve numerous points in Ohio, Pennsylvania, and New York in addition to those specified by division 5. Upon consideration of the petitions and of the records herein, we have vacated the orders entered by division 5 and reopened the proceedings for reconsideration. The questions raised in the petitions have been fully developed therein and on the records, and we have therefore denied the requests for oral argument.

Applicants have been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, except commodities in bulk and those of unusual length, height, or weight. During this entire period, Globe and Barnett have transported only traffic tendered to them by the Universal Carloading & Distributing Company and the National Carloading Corporation, re-

spectively. Each of the latter is a freight forwarder as defined in part IV of the act. In the prior reports herein, following our decisions in *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211, and *Bleich Common Carrier Application*, 27 M. C. C. 9, division 5 found that applicants have been and are common carriers. None of the petitioners question these findings. Part IV of the act was added in 1942. In section 402 (a), it defines freight forwarders as follows:

The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

This definition indicates quite plainly the character of service which freight forwarders perform, and it furnishes no basis for changing our conception of freight forwarders disclosed

in the many decisions, including those cited above, in which we considered the nature of their operations prior to the enactment of part IV. In this connection, it should be noted that section 418 of Part IV prohibits freight forwarders from employing or utilizing the instrumentalities of any carriers other than common carriers by motor vehicle, railroad, air, or water except in the performance within terminal areas of transfer, collection, or delivery services. The enactment of part IV of the act in no way affects the soundness of our decisions referred to above. We can perceive no reason for departing from the views expressed therein, and we accordingly affirm the findings of division 5 that applicants have been and are common carriers by motor vehicle.

Barnett contends that it should be granted authority to serve various points named in its application. It refers to the recommendation of the examiner that it be authorized to operate over a specified route between Pittsburgh and Cleveland, Ohio, serving Akron, Canton, and Youngstown, Ohio, as intermediate points. An examination of the record discloses that the only traffic transported by it between these points prior to June 1, 1935, was a single shipment, moved in March 1932 from Cleveland to Pittsburgh. There was no further operation between these points until some time in 1936. Its operations between other points and the operations conducted by Globe are accurately described in the prior reports. In our opinion, there is no basis for the granting of authority under the "grandfather" clause of the act to either Barnett or Globe ex-

cept between the points and over the routes specified by division 5 in the prior reports.

We come now to the contentions of protestants and interveners that division 5 failed properly "to restrict the authority" granted to applicants. Division 5 found that we cannot, consistently with applicants' common-carrier status, restrict their service to particular shippers. "We believe this a correct statement of the law." Section 203 (a) (14) of the act provides that the term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for compensation. A motor carrier whose service is restricted or limited to particular shippers of the ordinary kind obviously would not be a common carrier. Applicants are, however, as we have already determined, common carriers and are entitled to authority to continue operations as such. We are without power to restrict or limit their operations in a manner which would change their status from that of common carriers.

We are satisfied, however, that, in the circumstances here present, the relation between applicants and the freight forwarders should not be treated the same as that existing between an ordinary shipper and a motor common carrier. We pointed out in *Bléich Common Carrier Application, supra*, that the forwarder is not like an ordinary shipper who tenders its own goods to a carrier for transportation. The forwarder merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding

with many shippers or consignees that it will undertake to have the same transported to ultimate destinations. During the "grandfather" period, the freight forwarders have tendered to applicants, and applicants have transported, not traffic belonging to the forwarders but freight belonging to the general public, which the forwarders accepted and assembled as the result of the understanding with the shippers or consignees thereof that they would undertake to have the same transported. The facts which satisfy the requirement, insofar as applicants are concerned, that to be a common carrier there must be a holding out to transport for the general public are, first, that the forwarders dealt with the shipping public in general and did not limit their activities to selected shippers, and, second, that applicants transported traffic of the shipping public in general which was assembled by the forwarders as a result of the latter's undertaking to have the same transported. Under these circumstances, we think the freight forwarders must be treated, not as ordinary shippers, but as intermediary agencies through which applicants held themselves out to the general public to engage in the transportation of property by motor vehicle. To grant applicants authority to transport only traffic assembled by freight forwarders would enable them to continue all bona fide common-carrier operations in which they have been engaged during the "grandfather" period. They are entitled to no more or no less than this under the "grandfather" clause of section 206 (a) of the act. The issuance to them of certificates authorizing the transportation of general commod-



ities (with the exceptions previously indicated) which are at the time moving on bills of lading of freight forwarders, would effectively accomplish this purpose.

Applicants' operations during the "grandfather" period may be likened to the operations of common carriers of special commodities. In cases too numerous to require citation, we have found that common carriers who have transported special commodities only are entitled, not to authority to transport general commodities, but to authority to continue transporting such special commodities. Common carriers of petroleum products, in bulk, in tank trucks, furnish an example. Obviously, only a small part of the general public ever has occasion to ship petroleum products, in bulk, in tank trucks. The service of such carriers is therefore in fact available only to a small part of the public. To "specify the service to be rendered" by such carriers in the certificates issued to them, in accordance with the provisions of section 208 (a) of the act, as the transportation of petroleum products, in bulk, in tank trucks, does not, however, constitute a restriction of their service to particular shippers. On the contrary, it constitutes a grant of authority to transport petroleum products, in bulk, in tank trucks, for anyone who offers such traffic for transportation.

Applicants have transported only traffic assembled by freight forwarders. Their service has therefore been rendered only to that part of the public which dealt with freight forwarders. To authorize them to continue the transportation of traffic assembled by freight forwarders would not

constitute a restriction of their service to particular shippers. On the contrary, their service would continue to be available to the public to the same extent as it has been during the "grandfather" period. However, to authorize applicants to transport traffic, other than that assembled by freight forwarders, would permit them to enlarge and expand their operations beyond the scope of the transportation businesses in which they have been engaged. The issuance of authority to engage in such enlarged and expanded operations would not be in harmony with the "grandfather" provisions of the act.

We find no merit in the contention of certain protestants that we should "restrict the authority" issued to Globe to "truckload movements only." Its holding out to the general public, in the manner described above, was not limited to the transportation of truckload shipments. In fact, a substantial part of the traffic handled by it consisted of small shipments made by the general public. We think it is entitled to authority to transport both truckload and less-than-truckload shipments. The same protestants urge that we should restrict Globe to the transportation of shipments moving on bills of lading of the single freight forwarder, Universal Carloading & Distributing Company, which has assembled all traffic which Globe has transported during the "grandfather" period. We think that such a limitation is not warranted but that Globe is entitled to authority to transport traffic moving on bills of lading of any freight forwarder.

On reconsideration, we find that applicants are entitled to certificates authorizing operations by

them as common carriers of general commodities (except commodities in bulk and those of unusual length, height, or weight) which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports.

Upon compliance by applicants with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, appropriate certificates will be issued. The applications in all other respects will be denied.

PATTERSON, *Commissioner*, dissenting:

The single issue here is whether a motor carrier which, during the "grandfather" period, and since, has rendered, pursuant to a contractual arrangement, a highly specialized transportation service exclusively for a single forwarder and which has not rendered or held itself out to render transportation service for any other person, can be held to have been operating as a common carrier by motor vehicle and to be entitled to a certificate as a common carrier under section 206 (a) of the act. The service rendered consists of terminal-to-terminal line-haul movement of trucks containing only such merchandise as is loaded therein by such forwarder.

A common carrier, both at common law and under the Interstate Commerce Act, is one that holds itself out to serve the "general public." As such, it is bound, within the scope of its operations, to transport for all impartially. It is the right of the public to use the carrier's facilities and to demand service of it which is the real criterion of whether a particular carrier is a common carrier: *Tap Line Cases*, 234 U. S. 1.

Neither the forwarder's patrons nor any portion of the public had or has any such right in the situation here under consideration, the motor-carrier service being available to a single forwarder only under a special contract with it.

It would seem that the bare statement of the situation ought to suffice conclusively to establish the contract-carrier status of such a motor carrier, and doubtless the majority would have so held if the transportation contract had been with a person other than a forwarder. But, confronted by the fact that by section 418 of the act a forwarder is now prohibited from utilizing the services of carriers other than common carriers, except in terminal areas, and that a holding that the considered motor-carrier operations were those of a motor contract carrier would have the effect of preventing the carrier from continuing operations as conducted by it in the past, the majority, in order to avoid such a result, have attempted to stretch and pull the generally recognized and accepted concept of what constitutes a common carrier in support of their conclusion that these operations were those of a common carrier. That conclusion is without support, in my opinion, in fact or in law.

The argument advanced amounts to this: That because a forwarder, in relation to its patrons who tender it small packages or lots of goods, serves the general public, any motor carrier whose services the forwarder may choose to utilize in carrying out its individual undertakings with its various patrons to have such goods transported *ipso facto* also serves the general public and be-

comes therefore a common carrier. The fallacy of this argument lies in the facts that in such a case the motor carrier has no contractual relation whatever with the forwarder's patrons, it undertakes to transport for the forwarder only and with respect to an entirely different unit of transportation, it has no liability to the forwarder's patrons but its liability is to the forwarder only, and the forwarder's relation to the transporting carrier has uniformly been held to be that of a shipper who must be treated by the carrier, if a common carrier, in all respects the same as any other shipper without regard to the forwarder's previous dealings with its patrons. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co. v. United States*, 243 U. S. 444. That the Congress, in subjecting forwarders to regulation under part IV of the Interstate Commerce Act, fully recognized this is definitely and clearly disclosed by the legislative history. That history shows that it was the purpose of that legislation to prevent a forwarder, as a shipper over the line of motor or other carriers, from securing transportation at a less price than common-carrier rates open and available to other shippers. Among other provisions, the provision of section 418 prohibiting the utilization by a forwarder, except in terminal areas, of other than common carriers was in furtherance of that purpose. The effect of the majority holding, and the reasoning in support thereof, is to render this prohibition meaningless by declaring that any motor carrier, even though admittedly a contract carrier



and authorized to operate as such, is automatically transformed into a common carrier if any persons, or the only person; engaging its services should happen to be, with or without such carrier's knowledge, a forwarder. And under the same reasoning, a motor carrier utilized by a forwarder in a terminal area would likewise *ipso facto* become a common carrier although section 418 recognizes that within such areas a forwarder may utilize either a contract or a common carrier. The Commission in the *Acme case*, 8 M. C. C. 211, recognized that forwarders employed motor contract carriers as well as motor common carriers. It is now held by the majority here that there can be no such thing as a motor contract carrier of forwarder shipments.

Failure to recognize the clear distinction between the dealings of the forwarder with its patrons and the entirely separate and distinct dealings of the forwarder with the motor carrier, and the attempt to combine the two to support the conclusion reached, serve only to produce a confusion of thought obscuring the fundamental issue.

Authority may not be granted under the "grandfather" clause which will permit a carrier to expand its operations beyond the scope of those conducted in the past. The majority concede that to restrict the authorized operations to service for a particular shipper or particular shippers (in this case a forwarder, for the motor carrier had no transportation dealings with any one else) would be inconsistent with common-carrier status and that a motor carrier, whose service is so limited, "obviously would not be a

common carrier." They seek to maintain the integrity of the finding that the operations were in fact those of a common carrier, and at the same time to "effectively accomplish the purpose" of restricting the operations to service for forwarders, by limiting the authority to the transportation of commodities "which are at the time moving on bills of lading of freight forwarders." Their argument is that this is a restriction as to the character of traffic and does not constitute a restriction of service to particular shippers. But, if we look back of the form of the restrictive words to what caused them and what they are intended to cause and do cause, it is obvious that they can have no other effect than to restrict the carrier's service to that for forwarders only, for the only traffic that can possibly be moving at the time on forwarder bills of lading is that tendered to the carrier by forwarders. Where common-carrier operations are lawfully limited to the handling of a particular class of traffic, any person having such traffic to transport is entitled to avail himself of the carrier's service at the published tariff rates named for such service. Here, however, the carrier's service and its published tariff rates consistent with the above restriction can be availed of only by forwarders—not by the forwarder's patrons or by any other person. Thus a shipper, such as Montgomery Ward or Sears Roebuck, desiring to make a shipment over the line of the motor carrier under the same conditions and at the same rate as applicable to a like shipment by a forwarder, would be prevented from doing so. It could obtain that particular service, if at all, only by employing the

forwarder and paying the forwarder's charges, and even then would have no right to demand of the forwarder that the goods be transported over the line of that particular carrier.

If such a motor carrier is a common carrier, it may not limit its service to a single forwarder, or even to forwarders, but must render like transportation service for others at like rates. It cannot legally enter into a contract with a forwarder for such transportation unless it makes, publishes, and applies for such service a rate open to all. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155.

If the decision of the majority is sound in principle, then particular forwarders or groups of forwarders are free to utilize particular "common carriers" whose loaded-truck facilities are devoted exclusively to such forwarders. By reason of the ensuing large and steady volume of traffic, such carriers would presumably be in a position profitably to accord lower rates than common carriers serving shippers generally could afford to maintain. The latter carriers would thus be prevented from handling such traffic at all, either directly at less-than-carload or less-than-truckload rates or for the forwarder at their carload or truckload rates, and the principal occasion for operations of a forwarder, namely, to supplement and coordinate the services offered by regular common carriers by consolidating into carload or truckload lots articles of merchandise which such common carriers would otherwise be called upon to transport in less-than-carload or less-than-truckload lots, would cease to exist.

Considerations of expediency, or of supposed hardship that might result from a finding that the operations were those of a contract carrier do not justify declaring a contract carrier to be a common carrier. If applicants desire authority to operate as common carriers in order that they may continue to serve forwarders as in the past, and, as required of common carriers, to make their services available also to others, they should file an appropriate application.

#### ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of August, A. D. 1943.

No. MC-3339

GLOBE CARTAGE COMPANY, INC., COMMON  
CARRIER APPLICATION

No. MC-3340

GLOBE CARTAGE COMPANY, INC., CONTRACT  
CARRIER APPLICATION

No. MC-70614

THE BARNETT TRUCKING COMPANY COMMON  
CARRIER APPLICATION

No. MC-23458

THE BARNETT TRUCKING COMPANY CONTRACT  
CARRIER APPLICATION

*It appearing,* That on October 7, 1942, the Commission, division 5, entered its reports and orders in the above-entitled matters granting the

applications in certain respects, and denying the applications in all other respects;

*It further appearing*, That petition for reconsideration and oral argument have been filed by applicant in Nos. MC-70614 and MC-23458 and by various protestants and interveners in all of the above-entitled proceedings:

*It is ordered*, Upon further consideration of the records herein, and of the said petitions, that the proceedings be, and they are hereby, reopened for reconsideration on the records as made; that the said orders of October 7, 1942, be, and they are hereby, vacated and set aside; and that the said petitions be, and they are hereby, in all other respects denied.

*It further appearing*, That full investigation and reconsideration of the matters and things involved in these proceedings have been made, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and said reports of October 7, 1942, are hereby referred to and made a part hereof:

*It is ordered*, That the said applications, except to the extent that certificates are granted in the said report on reconsideration, be, and they are hereby, denied, effective October 6, 1943.

By the Commission.

[SEAL]

W. P. BARTEL,  
Secretary.



**In the District Court of the United States  
for the Southern District of Indiana,  
Indianapolis Division**

Civil Action No. 795

HANCOCK TRUCK LINES, INC.

vs.

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION

*FINDINGS OF FACT AND CONCLUSIONS OF LAW*

The three-judge Court herein having heretofore heard the evidence, the argument of counsel, and being duly advised in the premises, now finds the facts specially herein, and states separately its conclusions of law thereon.

The facts are found to be as follows:

*Finding No. 1*

The plaintiff is a corporation duly organized and existing under the laws of the State of Indiana, and has been such since 1933, with its principal office and place of business in the City of Evansville, Vanderburgh County, Indiana, and with an office in the City of Indianapolis, in Marion County, Indiana, and is a citizen and resident of the District Court for the Southern District of Indiana.

*Finding No. 2*

Plaintiff seeks to enjoin, set aside, annul, and restrain the enforcement of part of a certain order of the Interstate Commerce Commission, being Order No. MC-3339, entitled Globe Cartage Company, Inc., Common Carrier Application, which was approved on the 4th day of August, 1943, and later modified to become effective on the 31st day of March, 1944, and which proceeding is now designated by the Commission as No. MC-25567 (Sub. No. 8), Hancock Truck Lines, Inc., Successor to Globe Cartage Company, Inc.; its action arises under the Fifth Amendment to the Constitution of the United States; and under Section 205 (h) of the Motor Carrier Act of 1935, now Section 205 (g) of Part II of the Interstate Commerce Act, (U. S. Code, Sup. 2, Title 49, Sec. 305 (h)), and under the Acts of Congress, Code of Laws of the United States, Title 28, Sections 41 (28), 32 to 48, inclusive.

*Finding No. 3*

Throughout the period of plaintiff's corporate existence, it has been, and is now, a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign commerce of general commodities, with certain usual exceptions, for compensation, and has been, and is now, the holder of certain certificates of public

convenience and necessity issued to it by the defendant, Interstate Commerce Commission, different from the certificate and order of the Commission complained of in the complaint.

*Finding No. 4*

On or about the 29th day of January, 1936, an Indiana corporation known as Globe Cartage Company, Inc., having its general office and principal place of business in Indianapolis, Marion County, Indiana, filed its written application with the defendant, Interstate Commerce Commission, under the grandfather clause of Section 306, Title 49 U. S. C. A., duly alleging that it was in fact in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory for which such application was so made by it, and had so operated since that time down to the filing of its said application, such application and proceedings being entitled "Globe Cartage Company, Inc., Common Carrier Application," and bearing No. MC-3339, and wherein it requested said Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by said corporation to the Commission in all respects as provided for in Paragraph (b) of Section 206, of Part II of the Interstate Commerce Act afore-

said, and within 120 days after October 1, 1935; proceedings were had in relation to such application which resulted in a reference of said application to an examiner by said Commission; thereafter, evidence was heard by said Examiner, report was made to the Commission, and under date of October 7, 1942, Division 5 of the defendant, Interstate Commerce Commission, decided that said applicant was entitled to continue operations as a common carrier by motor vehicle of general commodities between certain points in Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, and Pennsylvania, over regular routes by reason of having been so engaged on June 1, 1935, and continuously since, a copy of the findings of fact, and the decision of said Division 5, dated October 7, 1942, aforesaid, being filed with the complaint, marked Exhibit "A," and made a part thereof, which Exhibit is adopted as a part of these findings.

#### *Finding No. 5*

Said Division No. 5 of the Interstate Commerce Commission made and adopted its special findings of fact, wherein, among other things, it was found by said Division 5 that on June 1, 1935, said Globe Cartage Company, Inc., was, and continuously since had been, in bona fide operation as a common carrier by motor vehicle, in interstate and foreign commerce, over certain of the

routes described in said application, particularly described in paragraph 6 of plaintiff's complaint.

*Finding No. 6*

Said Division No. 5 further found in said findings of fact that it could not, consistently with said applicant's common carrier status, restrict its services to particular shippers, namely, freight forwarders, and that to restrict the traffic which it might transport to shipments made by freight forwarders would, in effect and result, be a restriction of applicant's services to such forwarders.

*Finding No. 7*

Said Division 5 thereupon found and concluded that upon compliance by applicant with the requirements of Sections 215 and 217 of said Act, and of the Rules and Regulations of said Commission thereunder, that an appropriate certificate in conformity with such findings would be issued to it, all as is more particularly set out in said Exhibit A aforesaid, in Appendix B thereof.

*Finding No. 8*

Thereafter, further proceedings were had in relation to said application, and the defendant, Interstate Commerce Commission, upon petitions filed by protestants for reconsideration of such findings and conclusions, vacated and set aside the order entered by Division 5, and upon such



reconsideration the Commission entered its report and order showing the same to have been decided as of August 4, 1943, and a copy of the Commission's findings, conclusions, and order of August 4, 1943, is attached to the complaint, marked "Exhibit B," and made a part thereof, which Exhibit is adopted as a part of these findings.

*Finding No. 9*

The Commission in all respects confirmed the findings of fact of said Division No. 5 to the effect that said applicant, Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e., freight and commodities of every class, type, and character), except commodities in bulk and those of unusual length, height, or weight; it further found as a fact that said applicant was a common carrier by motor vehicle, and further confirmed and ratified the finding of Division 5 that the Commission could not, consistently with applicant's common carrier status, restrict its services to particular shippers; said Commission further found as a fact that said applicant, Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that said Commission was without power to restrict or

limit its operations in a manner which would change its status from that of a common carrier.

*Finding No. 10*

That contrary to the findings above set forth, the Commission did place certain restrictions in said order of August 4, 1943, limiting the transportation to be performed in the future by the plaintiff to those general commodities which are at the time moving on bills of lading of freight forwarders, and specific reference is made to Sheet 5 of Exhibit B, from which the following is set forth:

On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk and those of unusual length, height or weight) which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports.

*Finding No. 11*

A petition to modify the effective date of said order was filed, and on February 21, 1944, the Commission made the effective date thereof March 31, 1944, and then by order dated the 13th day of March, 1944, denied the petition to modify the effective date of said order beyond March 31,

1944, and said order was a final order when this action was commenced.

*Finding No. 12*

While said proceedings of Globe Cartage Company, Inc., were pending before said Commission in said Cause No. MC-3339, plaintiff acquired all of the common carrier operating rights of the said Globe Cartage Company, Inc., and that such transaction was with the Commission's approval by formal report and order, dated as of May 16, 1942, in proceeding (docket) numbered MC-F-1743, and such operating rights were duly and legally acquired by, and transferred to this plaintiff, Hancock Truck Lines, Inc., and it is now the successor in interest of all the rights of said Globe Cartage Company, Inc., and ever since the consummation of the transaction shortly after the last named date, plaintiff has been, and is now, the sole owner of all of said rights of Globe Cartage Company, Inc., and of all rights, privileges and grants to which Globe Cartage Company, Inc., would have been entitled to, under and pursuant to the proceedings in its said application for said certificate in Cause No. MC-3339 aforesaid, and plaintiff is therefore now interested in said proceeding, and in said final order, and will be the sole owner of such certificate as is issued thereunder.

Exhibit F in evidence is a correct copy of the findings of fact, report and order of the Com-

mission of May 16, 1942, aforesaid, and such Exhibit is adopted as a part of these findings.

*Finding No. 13*

The defendants, and each thereof, is threatening to enforce that part of the order thus complained of in the complaint, and unless they are enjoined by this Court they will enforce said order; plaintiff has exhausted all of its remedies before the defendant, Interstate Commerce Commission.

*Finding No. 14*

The plaintiff, as such common carrier of property by motor vehicles, has, and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and enforced just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate and foreign commerce, and has fully complied with all the rules and regulations of the Commission in relation thereto insofar as they are in effect at this time, and as such common carrier it is prohibited by law from

making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district territory, or description of traffic, in any respect whatsoever, and as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates.

*Finding No. 15*

The order of the Commission dated May 16, 1942, referred to in Finding No. 12, was made in said proceeding so numbered M. C. F. 1743, pursuant to a joint application filed before the Commission by Hancock Trunk Lines, Incorporated, and Globe Carriage Company, for purchase by the former of the operating rights of the latter; a hearing was had by Division 4 and a finding made by the Commission authorizing such purchase; when the application was filed, Hancock had only paid Globe \$100, but had agreed to pay an additional \$2,500 upon approval of such transaction by the Commission, \$2,500 upon final approval by the last concerned State regulatory authorities, and \$4,900 within ten days thereafter. The Commission found that approximately 65% of Globe's traffic consisted of business handled for Universal Carloading and Distributing Company, a freight forwarding company, and as a result of



handling such business the flow of traffic for Globe was unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it found, on the other hand, that Hancock enjoyed heavier traffic east out of St. Louis than in the reverse direction; the Commission found that, with some exceptions not material herein, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive; both carriers were found to be serving Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points; Globe did not believe that it would be justified in expending additional funds to develop a better balanced operation, and, as its functions and facilities substantially duplicated those of Hancock, the desired result could be accomplished through the unification of the operations of Hancock; the Commission found that such unification would result in better balanced lading between the common points served, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes; Hancock was found to have the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing or purchasing the same; the Commission

found that savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually, approximately \$20,000 of which represented the estimated cost to Globe, if it remained in operation in developing additional business to balance its present lading; the Commission found that the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation.

The Commission further found that the purchase of Hancock of the common carrier operating rights of Globe, upon the terms and conditions set out in the order, which terms and conditions were found by the Commission to be just and reasonable, was a transaction within the scope of Section 5 (2) (a) and would be consistent with the public interest and pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should conduct the common carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and Hancock would be entitled to a certificate covering any "grandfather" common carrier rights which might be confirmed as a result of those applica-

tions, which rights the Commission by its said order of May 16, 1942, authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; an order was thereupon entered by the Commission conforming to such findings, and such order is in plaintiff's Exhibit F.

*Finding No. 16*

Following the findings and order of the Commission set out in Finding No. 15, Hancock Truck Lines, Incorporated, in reliance upon such findings and order, paid to Globe said \$9,900, the balance of the purchase price for such common carrier operating rights.

*Finding No. 17*

In further reliance upon said findings and order of May 16, 1942, the plaintiff completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as a result of its grandfather applications aforesaid, with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission over the routes aforesaid; plaintiff thereafter continued to operate under said order of unification, and unified the common carrier rights of both of said com-

panies as authorized by the Commission, and has continued such unified operation up to this time, to the extent and in the manner as set out in paragraph 18 of its complaint.

*Finding No. 18*

If that part of the order complained of by the plaintiff is enforced, all of the business which plaintiff has built up under said unification order of May 16, 1942, will be destroyed, and plaintiff will be put back to the position which Globe was in when said order was entered, namely, maintaining duplications in terminals and facilities, handling an unbalanced lading, dead-heading of equipment, its savings in excess of \$50,000 per year through consolidation of overlapping functions, including terminal and pick-up delivery facilities, reduction in truck miles operated, and the use of vehicles operated by transporting heavier loads, will all be lost to it, and it will suffer and sustain immediate and irreparable injury, loss and damage on account of the enforcement of the part of said order complained of herein.

*Finding No. 19*

The Commission has made no finding of fact that the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and

necessity; nor has it found as a fact that it will be consistent with the public interest to place such restriction in said order; nor has it found that good cause exists for changing said order of May 16, 1942.

That part of the order complained of herein is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support; said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void.

Dated at Indianapolis, Indiana, this 25th day of May, 1944.

[S] SHERMAN MINTON,  
*Circuit Judge.*

[S] ROBERT C. BALTZELL,  
*District Judge.*

[S] LUTHER M. SWYGERT,  
*District Judge.*



#### CONCLUSIONS OF LAW

Upon the foregoing facts, the Court concludes the law to be as follows:

##### *One*

The Court has jurisdiction of the subject matter, and of the parties, in this cause of action.

##### *Two*

That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those "*which are at the time moving on bills of lading of freight forwarders*" is illegal and void, and the defendants should be permanently enjoined from enforcing the same.

Dated at Indianapolis, Indiana, this 25th day of May, 1944.

[S] SHERMAN MINTON, ———  
*Circuit Judge.*

[S] ROBERT C. BALTZELL,  
*District Judge.*

[S] LUTHER M. SWYGERT,  
*District Judge.*

**In the District Court of the United States  
for the Southern District of Indiana,  
Indianapolis Division**

---

Civil Cause No. 795

HANCOCK TRUCK LINES, INC., PLAINTIFF

vs.

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS

**INJUNCTION GRANTED**

This cause coming on now to be finally heard by the Court, and the parties appearing by their respective attorneys, and the Court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Upon the foregoing Special Findings of Fact and Conclusions of Law, it is

Ordered, adjudged, and decreed:

1. That part of the order made and entered by the defendant, Interstate Commerce Commission,

as of August 4, 1943, in Cause No. MC-3339, Globe Cartage Company, Inc., Common Carrier Application, complained of in the complaint, which confines authorized operations by Hancock Truck Lines, Inc., successor in interest of Globe Cartage Company, Inc., as a common carrier of general commodities, to general commodities, "which are at the time moving on bills of lading of freight forwarders," is illegal and void, and the defendants, United States and The Interstate Commerce Commission, and their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, should be, and they are hereby permanently enjoined and prohibited from enforcing or attempting to enforce the same in any manner.

Dated this 25th day of May 1944.

[s] SHERMAN MINTON,  
Judge, United States  
Circuit Court of Appeals.

[s] ROBERT C. BALTZELL,  
Judge, United States District Court.

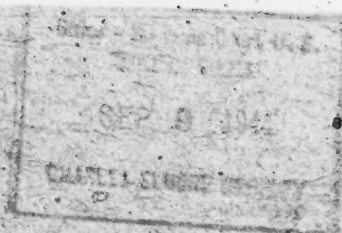
[s] LUTHER M. SWYGERT,  
Judge, United States District Court.







FILE COPY



No. 448

---

---

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS  
DIVISION

BRIEF FOR THE UNITED STATES AND INTERSTATE COM-  
MERCE COMMISSION IN OPPOSITION TO APPELLEE'S  
STATEMENT AGAINST JURISDICTION AND MOTION TO  
DISMISS OR AFFIRM

---

---



# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS  
DIVISION

BRIEF FOR THE UNITED STATES AND INTERSTATE COM-  
MERCE COMMISSION IN OPPOSITION TO APPELLEE'S  
STATEMENT AGAINST JURISDICTION AND MOTION TO  
DISMISS OR AFFIRM

## STATEMENT

This brief is filed by appellants under Rule 12, paragraph 3 and Rule 7, paragraph 3 of the rules of this Court, in opposition to appellee's statement against jurisdiction and motion to dismiss or affirm, which was served upon appellants on August 3, 1944.

As set out in appellants' jurisdictional statement, the final decree setting aside an order of the Interstate Commerce Commission here sought

to be reviewed, was entered by a three-judge court on May 25, 1944. The appeal was granted on July 22, 1944, by a single judge, who was a member of the three-judge court. This date was more than 30 days after the date of the final decree, but within 60 days of that date. Appellee objects to the jurisdiction of this Court on two grounds: (1) That the appeal was not timely because not taken within 30 days of the entry of the final decree; and (2) that the appeal was improperly granted because it was allowed, not by a majority of the statutory three-judge court which had entered the final decree, but rather by a single district judge who had sat as a member of that court.

It is submitted that both these contentions are without merit.

#### ARGUMENT

1. The pertinent statutory provisions relating to appeals to this Court from decrees of three-judge district courts setting aside orders of the Interstate Commerce Commission are 28 U. S. C. 47 and 47a. The former Section provides in part:

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, [setting aside an order of the Commission] in such case if such appeal be taken within thirty days after the order, in respect to

which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

The latter Section provides in part:

A final judgment or decree of the district court in the cases specified in section 44<sup>1</sup> of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree \* \* \*

Since the present case involves an appeal from a final judgment, rather than an interlocutory judgment, Section 47a, on its face, appears to be applicable, and an appeal within the 60 days prescribed by that Section appears to be timely. Appellee urges however, that Section 47a was in fact repealed by the Act of February 13, 1925 (43 Stat. 936, 938, 940) and that the compilers of the code have improperly included its provisions in the code. Thus, it says, the only applicable provision is Section 47. Since the last sentence of that Section makes the procedure applicable

<sup>1</sup> Section 44 prescribes the procedure in the district courts. (28 U. S. C. 44):

"(b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission \* \* \*"



4

to appeals from interlocutory injunctions also applicable to final hearings, appellee asserts that the 30-day appeal time set forth in that Section for appeals from interlocutory injunctions must also be considered as applicable to appeals from final decrees.

Both the legislative history of these provisions and the consistent practice of this Court are to the contrary.

The original Commerce Court Act of June 18, 1910 (36 Stat. 539) gave to the Commerce Court jurisdiction over four types of cases: (1) Suits to enforce orders of the Interstate Commerce Commission, (2) suits to enjoin orders of the Commission, (3) certain suits to prevent unjust discriminations, and (4) certain mandamus proceedings. Section 2 of that Act (36 Stat. 542) provided that "a final judgment or decree of the commerce court may be reviewed by the Supreme Court of the United States if appeal \* \* \* be taken \* \* \* within sixty days after the entry of said final judgment or decree." The same Section provided that an appeal might be taken to the Supreme Court within 30 days from the entry of an interlocutory order of the Commerce Court granting or continuing an injunction restraining an order of the Commission.

The Commerce Court was abolished by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219-221), and by that Act all its jurisdic-

tion was transferred to the several district courts. With respect to one of the four types of cases falling within the Commerce Court's jurisdiction, namely, suits to enjoin orders of the Commission, it was provided that both the interlocutory and the final hearing should be before three judges. This Act further provided for a direct appeal to the Supreme Court from an order granting or denying an interlocutory injunction against a Commission order, provided such appeal was taken within 30 days.<sup>2</sup> This language is the basis for 28 U. S. C. 47. The next sentence in the Urgent Deficiencies Act (38 Stat. 220), the basis for 28 U. S. C. 47a, reads as follows:

A final judgment or decree of the district court may be reviewed by the Supreme Court \* \* \* if appeal \* \* \* be taken \* \* \* within sixty days after the entry of such final judgment or decree \* \* \*

Appellee contends that this last sentence does not refer to appeals from final judgments in cases involving suits to set aside orders of the Com-

<sup>2</sup> This portion of the statute reads (38 Stat. 220):

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying \* \* \* an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, \* \* \* and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

mission which, under the Urgent Deficiencies Act must be heard by a three-judge court. It argues that instead this language refers only to appeals in the other types of cases within the jurisdiction of the Commerce Court, which, under the Urgent Deficiencies Act, were transferred to the district courts, and were to be heard by a single district judge. It is apparently on this assumption that appellee bases its contention that the sentence last quoted was repealed by the Act of February 13, 1925 (43 Stat. 936), the pertinent portion of which provides (43 Stat. 936, 938, 941, 942):

SEC. 1. \* \* \* A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise: \* \* \*

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money. \* \* \*

SEC. 13. That the following statutes and parts of statutes be, and they are, repealed:

\* \* \* All other Acts and parts of Acts

in so far as they are embraced within and superseded by this Act or are inconsistent therewith.

The contention is that since the language of the Urgent Deficiencies Act now found in 28 U. S. C. 47a did not relate to appeals from judgments in cases involving suits to enforce or suspend orders of the Commission, and since all the provisions of that Act except those relating to appeals in such cases were repealed by the 1925 Act, the language of 28 U. S. C. 47a must be considered repealed by that Act.

The fallacy in this argument is the basic assumption that the language of 28 U. S. C. 47a, as found in the Urgent Deficiencies Act, related only to appeals from one-judge court final judgments in cases not involving suits to enforce or set aside orders of the Commission, and did not embrace also appeals from three-judge court final judgments in suits to set aside Commission orders. It is obvious, we submit, that this language referred to appeals from both types of cases. In the first place, the unrestricted wording of this language is entirely inconsistent with the restricted construction which appellee would place upon it. Furthermore, it is to be noted that this language follows immediately, and in the same paragraph, the provision, now found in 28 U. S. C. 47, relating to appeals from interlocutory injunctions restraining or

ders of the Commission (see footnote 2, *supra*, p. 5). Certainly Congress intended the two sentences to be read together, and in prescribing the appeal time from final decrees, it must have had in mind particularly appeals from final decrees in the type of case about which it had been speaking in the preceding sentence, that is, in suits to restrain orders of the Commission. Since this language of the Urgent Deficiencies Act thus does relate to appeals from final decrees in cases seeking to set aside orders of the Commission, and since the Act of February 13, 1925, reaffirms so much of the Urgent Deficiencies Act as relates to the review of both interlocutory or final decrees in suits to set aside orders of the Commission, it is evident that the latter Act reaffirms, rather than repeals, this language of 28 U. S. C. 47a. Consequently, the compilers of the code properly included this provision in the 1934 edition of the code to correct their error in deleting it in earlier editions. And if 28 U. S. C. 47a be deemed not repealed, its specific provision regarding the time for appeal from a final decree must be considered to control, so far as appeal time is concerned, the more general provision now found in 28 U. S. C. 47, that "upon the final hearing \* \* \* the same procedure [as in interlocutory hearings] as to expedition and appeal shall apply."

If appellee's contentions are correct, a very large proportion of appeals in suits to set aside



orders of the Commission have been improperly granted and numerous decisions of this Court have been made in appeals over which this Court had no jurisdiction. A review of the briefs in the Commission's cases before this Court in the past two Terms alone indicates that in the following cases appeals were taken more than 30 days, but within 60 days, after the final decree: *L. T. Barringer & Co. v. United States*, 319 U. S. 1; *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission v. Hoboken R. Co.*, 320 U. S. 368; *Crescent Express Lines v. United States*, 320 U. S. 401; *McLean Trucking Co. v. United States*, 321 U. S. 67; *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U. S. 194; *United States v. Wabash R. Co.*, 321 U. S. 403; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1; *United States v. Marshall Transport Co.*, 322 U. S. 31. In *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.*, *supra*, the appellee made the same contention as is made in the case at bar in support of a motion to dismiss the Commission's appeal or affirm. While no specific action was taken on the motion, the Court proceeded to decide the case on the merits and thus impliedly rejected the contention.

Appellee refers to the statement made by this Court in *Virginian Ry. v. United States*, 272 U. S. 658, 672, that the Urgent Deficiencies Act had shortened the appeal time. It asserts that the Court meant that the Urgent Deficiencies Act had reduced the appeal time from 60 days to 30 days. It appears, however, that all that the Court meant was that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time (see 28 U. S. C. 350). And the motion to set aside the judgment, filed in the instant case by a private defendant (the Regular Common Carrier Conference of the American Trucking Associations, Inc.), which indicates that this defendant thought the appeal time had expired at the end of 30 days, is of no significance. This admission is not, of course, binding on these appellants, and, in any event, the jurisdiction of this Court cannot be expanded or contracted by admissions of the parties.

2. The second ground for appellee's motion is that the appeal was improperly taken because the order allowing the appeal and the other appeal papers were signed only by the district judge in whose court the suit was filed rather than by the three judges who composed the statutory court which had rendered the final decree. This contention is equally without merit.

In 28 U. S. C. 47 and 47a, as above indicated, the trial and appellate procedure in suits seeking to set aside orders of the Commission is prescribed in detail. It is significant that while Section 47 requires the assembly of three judges to hear and determine an application for an interlocutory injunction in such a case,<sup>3</sup> and further provides that "upon the final hearing \* \* \* the same requirement as to judges \* \* \* shall apply," there is no language in either Section requiring three judges for the granting of an appeal to the Supreme Court. Unquestionably the failure of Congress to provide specifically for the assembly of three judges to allow an appeal was not inadvertent. The granting of an appeal, when, as here, it is a matter of right, is a purely ministerial act. Such an act is entirely unlike the hearing and determining of the case either at the interlocutory or the final stage, where the questions involved are so important from the standpoint of the public interest as to make the judgment of

<sup>3</sup> The pertinent portion of Section 47 provides:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. \* \* \*

more than one judge desirable. Accordingly, there is no need to assemble three judges merely to sign their names to an appeal order. And in many cases an appeal might be jeopardized merely because of the inability of an appellant to assemble three judges within the time allowed for taking an appeal.

Again, it has been the consistent and usual practice in taking appeals to this Court in this type of case to have the appeal allowed by a single judge. In *Tagg Bros. v. United States*, 280 U. S. 420, 433, the opinion recites that "the District Judge allowed an appeal to this Court." Foot-note 2 on the same page states:

In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. \* \* \*

It seems apparent that this Court thought that the single judge's action, insofar as it involved the granting of the appeal, was perfectly proper. Furthermore, an examination of the printed records in some of the Commission's cases which have come before this Court in the past two Terms reveals that the appeals in the following cases were allowed by but one judge: *Interstate Commerce Commission v. Inland Waterways*, 319 U. S. 671; *Interstate Commerce Commission v. Hoboken*

*R. Co.*, 320 U. S. 368; *City of Yonkers v. United States*, 320 U. S. 685; *Thomson v. United States*, 321 U. S. 19; *McLean Trucking Co. v. United States*, 321 U. S. 67; *United States v. Wabash R. Co.*, 321 U. S. 403; *Cornell Steamboat Co. v. United States*, 321 U. S. 634; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1; *United States v. Marshall Transport Co.*, 322 U. S. 31; *Interstate Commerce Commission v. Jersey City*, No. 767, October Term, 1943, decided May 29, 1944. This practice was authorized under Rule 36 of the rules of this Court, which provides that, "In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

Finally, any doubt that may have existed on this score was effectually removed by Section 3 of the Act of April 6, 1942, 56 Stat. 198-199, 28 U. S. C. Supp. III, 792. This Section provides that in a case of this type a single judge may "enter all orders required or permitted by the

\* Section 3 provides (28 U. S. C. Supp. III, 792):

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3 (being, respectively, secs. 380, 47, and 380a of title 28, U. S. C.), or the



Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action \* \* \*." Under the Rules of Civil Procedure, a single judge is permitted to grant an appeal to the Supreme Court. Thus, Rule 72 provides that an appeal from a district court to the Supreme Court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal," and, as above indicated, Rule 36 of the rules of this Court authorizes the granting of an appeal to this Court from a district court by a single judge.

Act of February 11, 1903 (32 Stat. 823; U. S. C., 1940 edition, title 15, sec. 28 and title 49, sec. 44), as amended by section 1 of this Act, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action: *Provided, however,* That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion should be denied and the Court's jurisdiction sustained.

CHARLES FAHY,

*Solicitor General.*

WENDELL BERGE,

*Assistant Attorney General.*

ROBERT L. PIERCE,

EDWARD DUMBAULD,

*Special Assistants to the Attorney General.*

WALTER J. CUMMINGS, Jr.,

*Attorney.*

DANIEL W. KNOWLTON,

*Chief Counsel,*

NELSON THOMAS,

*Attorney,*

*Interstate Commerce Commission.*

AUGUST 1944.



**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**FEB 10 1945**

**CHARLES ELWRE CROPLEY**  
CLERK

**No. 448**

---

**In the Supreme Court of the United States**

**OCTOBER TERM, 1944**

---

**UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, APPELLANTS**

**v.**

**HANCOCK TRUCK LINES, INC.**

---

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF INDIANA**

---

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE  
COMMERCE COMMISSION**

---





# INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	6
Argument:	
I. The appeal was taken in the proper manner and in due time	12
A. Allowance of appeal by a single judge is proper	13
B. Appeal may be taken in sixty days from final decree	17
II. The Commission may grant operating authority confining appellee to transportation of commodities "moving on bills of lading of freight forwarders"	34
III. The district court improperly exercised the Commission's functions	46
Conclusion	48
Appendix	49

## CITATIONS

Cases:	
<i>Acme Fast Freight v. United States</i> , 30 F. Supp. 968, affirmed per curiam, 309 U. S. 638	45
<i>Acme Fast Freight, Inc., Common Carrier Application</i> , 8 M. C. C. 211	45
<i>Addison v. Holly Hill Fruit Products, Inc.</i> , 322 U. S. 607	12, 47
<i>Allton Railroad Co. v. United States</i> , 315 U. S. 15	9, 38
<i>American Motor Dispatch, Inc., Common Carrier Application</i> , 26 M. C. C. 346	44
<i>Berringer &amp; Co., L. T. v. United States</i> , 319 U. S. 1	32
<i>Bleich Common Carrier Application</i> , 27 M. C. C. 9	44
<i>Board of Public Utility Comm'rs v. United States</i> , 21 F. Supp. 543	35-36
<i>Board of Railroad Commissioners v. Great Northern Ry.</i> , 281 U. S. 412	35
<i>Carolina Scenic Coach Lines v. United States</i> , 56 F. Supp. 801, affirmed per curiam, December 11, 1944, No. 637 present Term	35

## Cases—Continued.

	Page
<i>Chesapeake &amp; Ohio Ry. Co. v. United States</i> , 35 F. (2d) 769, affirmed, 283 U. S. 35	12, 48
<i>Chicago, Rock Island &amp; Pacific Railway Co. Extensions</i> , 19 M. C. C. 702	41
<i>Chicago, St. P., M. &amp; O. Ry. Co. v. United States</i> , 322 U. S. 1	10,
	15, 33, 36, 42
<i>City of Yonkers v. United States</i> , 320 U. S. 685	15
<i>Cornell Steamboat Co. v. United States</i> , 321 U. S. 634	11, 15, 46
<i>Crescent Express Lines v. United States</i> , 320 U. S. 401	9,
	10, 33, 38, 40, 42
<i>Eastern Central Motor Carriers Ass'n v. United States</i> , 321 U. S. 194	33
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U. S. 591	37
<i>Freight Forwarding Investigation</i> , 229 I. C. C. 201	45
<i>Georgia Public Service Commission v. United States</i> , 283 U. S. 765	37
<i>Gray v. Powell</i> , 314 U. S. 402	11, 46
<i>Great Northern Ry. v. Merchants Elevator Co.</i> , 259 U. S. 285	35
<i>Gregg Cartage Company v. United States</i> , 316 U. S. 74	9, 39
<i>Hoey Cartage Co., Contract Carrier Application</i> , 28 M. C. C. 102	44
<i>Interstate Commerce Commission v. Columbus &amp; Greenville Ry. Co.</i> , 319 U. S. 551	32, 33
<i>Interstate Commerce Commission v. Hoboken R. Co.</i> , 320 U. S. 368	15, 33
<i>Interstate Commerce Commission v. Inland Waterways</i> , 319 U. S. 671	15, 32-33
<i>Interstate Commerce Commission v. Jersey City</i> , 322 U. S. 503	15
<i>Interstate Commerce Commission v. Oregon-Washington Railroad &amp; Navigation Co.</i> , 288 U. S. 14	32
<i>Kansas City Southern Transport Co., Inc., Common Carriers Application</i> , 10 M. C. C. 221	41
<i>Latham v. United States</i> , 131 U. S. Appendix, XCVII	14
<i>Louisiana, Arkansas &amp; Texas Railway Co., Common Carrier Application</i> , 22 M. C. C. 213	41
<i>Matton Co. v. Murphy</i> , 319 U. S. 412	14
<i>McDonald v. Thompson</i> , 305 U. S. 263	9, 39
<i>McLean Trucking Co. v. United States</i> , 321 U. S. 67	15, 53
<i>Mississippi Valley Barge Line Co. v. United States</i> , 292 U. S. 282	9, 36
<i>Natural Gas Co. v. Slattery</i> , 302 U. S. 300	35
<i>Noble v. United States</i> , 319 U. S. 88	9, 10, 38, 40, 42, 48
<i>Pennsylvania R. R. Co. v. United States</i> , No. 182 this Term, decided January 29, 1945	15, 33
<i>Porter v. Investors Syndicate</i> , 286 U. S. 461	35
<i>Rochester Telephone Corp. v. United States</i> , 307 U. S. 125	11, 46

### III

#### Cases—Continued.

Page

<i>Seaboard Air Line Railway Co. Motor Operation</i> , 17 M. C. C. 413.....	41
<i>Securities Commission v. Chenery Corp.</i> , 318 U. S. 80.....	11, 46
<i>St. Louis &amp; O'Fallon Ry. Co. v. United States</i> , 279 U. S. 461.....	22
<i>Tagg Bros. v. United States</i> , 280 U. S. 420.....	7, 14
<i>Thomson v. United States</i> , 321 U. S. 19.....	11, 15, 41, 46
<i>Union Stock Yard &amp; Transit Co. v. United States</i> , 308 U. S. 213.....	45
<i>United States v. Carolina Carriers Corp.</i> , 315 U. S. 475.....	9, 10, 12, 38, 40, 42, 47
<i>United States v. Marshall Transport Co.</i> , 322 U. S. 31.....	15, 33
<i>United States v. Maher</i> , 307 U. S. 148.....	9, 38, 42
<i>United States v. Pennsylvania R. R. Co.</i> , Nos. 47-48 this Term, decided January 29, 1945.....	15, 33
<i>United States v. Sing Tuck</i> , 194 U. S. 161.....	35
<i>United States v. Vigil</i> , 10 Wall. 423.....	14
<i>United States v. Wabash R. Co.</i> , 321 U. S. 403.....	15, 33
<i>Virginian Ry. v. United States</i> , 272 U. S. 658.....	33, 37
<i>Western Paper Makers' Chemical Co. v. United States</i> , 271 U. S. 268.....	37
<i>Yakus v. United States</i> , 321 U. S. 414.....	35

#### Statutes:

Act of February 11, 1903 (32 Stat. 823, as amended).....	25, 26, 27
Hepburn Act (34 Stat. 584):	
Sec. 5.....	25
Mann-Elkins Act of July 18, 1910 (36 Stat. 539):	
Sec. 1.....	23
Sec. 2.....	24
Sec. 3.....	29
Sec. 17.....	26
Act of March 4, 1913, 37 Stat. 1013.....	27
Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 28 U. S. C. 44, 47, 47a).....	6, 7, 8, 13, 17, 18, 19, 21, 25, 27, 49
Packers and Stockyards Act of 1921 (7 U. S. C. 191-231).....	31-32
Act of February 13, 1925 (43 Stat. 936, 28 U. S. C. 345).....	7, 8, 27
Sec. 1.....	20
Sec. 13.....	21
Interstate Commerce Act, Part I, as amended:	
Sec. 3.....	24
Sec. 20.....	24
Sec. 23.....	24
Interstate Commerce Act, Part II, as amended:	
Sec. 203 (a) (14).....	42, 44, 55
Sec. 206 (a).....	3, 55
Sec. 208 (a).....	9, 10, 39, 42, 57
Sec. 209 (a).....	3
Sec. 209 (b).....	10, 40

# IV

## Statutes—Continued:

	Page
Interstate Commerce Act, Part IV (56 Stat. 284; 49 U. S. C. Supp. III, 1001-1022)	45
Act of April 6, 1942 (56 Stat. 198-199, 28 U. S. C. Supp. III, 792):	
Sec. 3	7, 16
Judicial Code:	
Sec. 210	24, 25
Sec. 238	7, 54
Sec. 266	27, 33
Title 28, United States Code:	
Sec. 41	24
Sec. 44	19, 49, 51
Sec. 47	6, 13, 19, 26, 49, 52
Sec. 47a	7, 17, 21, 26, 34, 49, 53
Sec. 350	34

## Miscellaneous:

Berger, <i>Exhaustion of Administrative Remedies</i> (1939), 48	
Y. L. J. 981	36
Conference Rep. No. 91, 63d Cong., 1st sess.	30
50 Cong. Rec. 4527, 4622, 5407-S, 5409, 5425, 5561, 5594, 5612	29, 30
66 Cong. Rec. 2917, 2925	31, 32
Dobie, <i>Handbook of Federal Jurisdiction and Procedure</i> (1928), p. 11	26
H. R. 8206, 68th Cong., 1st sess.	30, 31
H. Rep. No. 64, 63d Cong., 1st sess.	29
Hearings, H. Committee on the Judiciary, H. R. 8206, 68th Cong., 1st sess., p. 16	30, 31
Rules of Civil Procedure, Rule 72	7, 17
Rules of the Supreme Court of the United States, Rule 36	15, 17
S. 2060, 68th Cong., 1st sess.	31
1 Sharfman, <i>The Interstate Commerce Commission</i> (1931) 22-24, 27	25
Stern, <i>Review of Findings</i> (1944), 58 Harv. L. Rev. 70	46

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 448

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, APPELLANTS

HANCOCK TRUCK LINES, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE  
COMMERCE COMMISSION

## OPINION BELOW

No opinion was written by the district court. Findings of fact and conclusions of law (R. 65-73) were filed on May 25, 1944. The decision of the Interstate Commerce Commission (R. 40-49) is reported in 42 M. C. C. 547.

## JURISDICTION

The final decree of the three-judge district court was entered on May 25, 1944 (R. 74). Petition for appeal was presented and allowed on July 22, 1944 (R. 74-75, 78). The jurisdiction



of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). After considering the jurisdictional statements, on November 6, 1944, the Court entered an order postponing further consideration of the question of its jurisdiction until the hearing of the case on the merits (R. 150).

#### QUESTIONS PRESENTED

1. Whether the appeal was properly taken, since it was allowed by a single judge rather than by the three members of the statutory district court and since it was taken within 60 days (28 U. S. C. 47a) rather than 30 days (28 U. S. C. 47) after entry of the decree.

2. Whether the Commission, under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act, was empowered to limit appellee's operating authority as a common carrier by motor vehicle to transportation of traffic assembled by freight forwarders.

3. Whether the district court improperly exercised the Commission's administrative functions.

#### STATUTES INVOLVED

The statutes involved are Sections 210 and 238 of the Judicial Code, as amended, and Sections.

203 (a) (14), 206 (a), and 208 (a) of Part II of the Interstate Commerce Act, as amended. The pertinent provisions are set forth in the Appendix, *infra*, pp. 49-57.

#### STATEMENT

Under 28 U. S. C. 41 (28), 43-48, appellee, Hancock Truck Lines, Inc., filed a complaint (R. 1-11) seeking to set aside the Interstate Commerce Commission's order of August 4, 1943 (R. 49-50) in a proceeding wherein appellee's predecessor, the Globe Cartage Company (hereinafter referred to as Globe), sought operating authority as a carrier of general commodities by motor vehicle under the "grandfather" clause of Sections 206 (a) (Appendix, *infra*, pp. 55-56) and 209 (a) of Part II of the Interstate Commerce Act. With the Commission's approval, appellee became successor in interest to Globe and acquired whatever operating rights Globe might ultimately obtain in the "grandfather" clause proceeding (R. 69; 99-105; 38 M. C. C. 382).

Globe's application under Sections 206 (a) and 209 (a) of the Act was the subject of a report by Division 5 of the Commission, dated October 7, 1942 (R. 12-39; 41 M. C. C. 313). Division 5 found that Globe had been engaged solely in the transportation of freight for the Universal Carloading and Distributing Company, a freight forwarder, as was demonstrated by the fact that of sev-

eral thousand trips shown of record, not one related to service other than that performed for Universal (R. 13). Division 5 concluded that Globe had been a common carrier, rather than a contract carrier (R. 14-15), and that to restrict its operation to carriage for freight forwarders would be inconsistent with its common carrier status (R. 21-22). Commissioner Rogers, in a separate opinion, expressed the view that Globe's operating authority should be restricted to the type of operations which it had performed in the past, and suggested that this might be achieved by restricting its operations to traffic moving on the bills of lading of freight forwarders (R. 22). Commissioner Patterson dissented on the ground that Globe, in his judgment, had been a contract carrier rather than a common carrier (R. 23).

Numerous petitions for reconsideration were filed by various parties to the proceeding, and reconsideration was granted (R. 41-42), following which the Commission on August 4, 1943, issued the report (R. 40-49; 42 M. C. C. 547) and order (R. 49-50) attacked in the present suit. The full Commission, like Division 5, concluded that Globe during the "grandfather" period had been a common carrier rather than a contract carrier (R. 43). But it held that in order to allow Globe to continue all *bona fide* operations which it had performed in the past, while at the same time keeping it from enlarging its business beyond

the scope of its prior operations, the operating authority granted should be limited to carriage of general commodities "which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior report". The full Commission found that such a limitation was not at all inconsistent with Globe's common carrier status. (R. 44-45.) Commissioner Patterson again dissented, on the ground that Globe was a contract carrier and ~~was~~ not entitled to operating authority as a common carrier (R. 46-49). Globe's successor, Hancock Truck Lines, filed a petition for reconsideration (R. 127-144) which was denied (Tr. 420).<sup>1</sup>

On March 29, 1944, appellee filed suit in the United States District Court for the Southern District of Indiana, to set aside the Commission's order (R. 1-11). The United States and the Commission filed answers (R. 53-59), and the cause came on for hearing on April 8, 1944, and April 28, 1944 (R. 65, 88). The Regular Common Carrier Conference of the American Trucking Association, Inc.<sup>2</sup> which had intervened before

<sup>1</sup> The order denying the petition for reconsideration was part of Hancock's Exhibit G (see R. 94). Under the stipulation regarding the printing of the record (R. 148-149), the parties herein are permitted to refer to any portion of Exhibit G (Tr. 356-420). The transcript of record is on file with the clerk of this Court.

<sup>2</sup> This party is the appellant in No. 449, this Term.

the Commission (R. 41) was permitted to intervene in the court below (R. 60-61). Without opinion, the district court on May 25, 1944, entered its findings of fact, conclusions of law, and decree setting aside that part of the Commission's order which confined plaintiff's operating authority to commodities moving on bills of lading of freight forwarders (R. 65-73). Petition for appeal was presented and allowed on July 22, 1944 (R. 74-75, 78).

After appellants filed their jurisdictional statements in this Court, appellee filed documents urging that the appeal was not timely taken and was improperly taken, because allowed by one judge rather than three judges. On November 6, 1944, the Court entered an order stating that it was postponing further consideration of the jurisdictional question to the hearing on the merits (R. 150).

#### SUMMARY OF ARGUMENT

##### I

The appeal herein was taken in the proper manner and in due time. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220; 28 U. S. C. 47), requires action by a court of three judges only for the hearing and determination of suits to set aside orders of the Interstate Commerce Commission, and does not require that appeals in such cases be allowed by the three judges, or a majority of them. The absence of such a requirement in the statute is not inadvertent. The granting of an appeal, when, as here, it is a matter of



right, is simply a ministerial act. *Tagg Bros. v. United States*, 280 U. S. 420, 433, indicates that a single judge may allow an appeal. Moreover, in numerous instances this Court has decided on their merits cases where the appeal was allowed by one judge. Any doubt as to the point is removed by Section 3 of the Act of April 6, 1942 (56 Stat. 198-199, 28 U. S. C. Supp. III 792), which authorizes a single judge to enter all orders required or permitted by the Rules of Civil Procedure. Rule 72 of such rules provides that an appeal may be allowed as prescribed by the Rules of this Court; and Rule 36 of the Rules of this Court authorizes allowance of an appeal by a single judge.

An appeal from a final decree may be taken within 60 days after entry thereof. This is specifically prescribed by a provision of the Urgent Deficiencies Act now found in 28 U. S. C. 47a. That provision, being one which "relate[s] to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money" was reaffirmed (and not repealed, as appellee contends) by the Act of February 13, 1925 (43 Stat. 936; 28 U. S. C. 345), amending Section 238 of the Judicial Code. The legislative history of the Urgent Deficiencies Act shows that the provision found in 28 U. S. C. 47a was enacted as a part of the trial and appellate procedure made necessary by the decision of Congress to adopt a new

type of three-judge court as the reviewing agency for orders of the Interstate Commerce Commission in place of the Commerce Court abolished by that statute. Therefore that provision is applicable to suits to set aside the Commission's orders, and "relate[s] to the review of \* \* \* final judgments and decrees" in such suits; it is not, as appellee argues, a provision applicable only to other types of suits formerly cognizable in the Commerce Court and transferred by the Urgent Deficiencies Act to district courts, to which the requirement of three judges does not apply. Hence the provision was not repealed by the Act of 1925, and governs the time for appeal in the present case. The legislative history of the Act of 1925 indicates that Congress did not intend to repeal 28 U. S. C. 47a.

## II

The Interstate Commerce Commission, having made a finding that the only type of traffic transported by appellee's predecessor in interest during the "grandfather" period consisted of commodities "moving on bills of lading of freight forwarders," may lawfully grant to appellee operating authority, as a common carrier by motor vehicle, confined to transportation of such commodities. Appellee now challenges this restriction, but we believe it has no standing to do so. Its petition to the Commission for reconsideration expressly waived objection to this restriction, and

since it failed to exhaust its administrative remedies, the district court should not have passed upon the validity of the restriction. However, the restriction was justified and was within the Commission's statutory power.

The finding that appellee's predecessor in interest transported only commodities moving on bills of lading of freight forwarders cannot be challenged by appellee, since the record before the Commission was not put in evidence. *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286. That finding being accepted, it would not be in harmony with the "grandfather" clause as construed by this Court for the Commission to have granted appellee any operating authority more extensive in scope or character. Nothing but "substantial parity" with prior *bona fide* operations is contemplated by the statute. Enlargement or expansion of the business is not permitted. *McDonald v. Thompson*, 305 U. S. 263, 266; *United States v. Maher*, 307 U. S. 148, 155; *Alton R. Co. v. United States*, 315 U. S. 15, 22; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481; *Gregg Cartage Co. v. United States*, 316 U. S. 74, 83; *Noble v. United States*, 319 U. S. 88, 92; *Crescent Express Lines v. United States*, 320 U. S. 401, 408-409.

The Commission in thus restricting appellee's right was merely performing its duty under Section 208 (a) to "specify the service to be rendered". This Court has sustained numerous

restrictions entered under this and comparable language in Section 209 (b) relating to contract carriers, by virtue of which the Commission sought to confine carriers to the exact type of service performed by them during the "grandfather" period. *E. g., United States v. Carolina Carriers Corp.*, 315 U. S. 475; *Noble v. United States*, 319 U. S. 88; *Crescent Express Lines v. United States*, 320 U. S. 401. Furthermore, in many cases involving motor carrier service auxiliary or supplemental to rail service, provisions have been upheld confining the motor carrier transportation authorized to transportation of commodities moving on railroad bills of lading. The propriety of the type of operating authority granted to appellee is thus clearly demonstrated.

Since the Commission was not exercising its power under Section 208 (a) to attach to a "grandfather" clause certificate "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require", the district court erred in concluding that this restriction could not be sustained in the absence of a finding by the Commission that it was required by the public convenience and necessity. Cf. *Chicago, St. P., M. & D. Ry. Co. v. United States*, 322 U. S. 1.

The district court also erred in concluding that such restriction was inconsistent with appellee's common carrier status. The Commission's contrary conclusion was based on the fact that ap-

appellee's predecessor held out to transport for the general public, because it transported for a freight forwarder, which in turn dealt with the public in general and did not limit its activities to particular shippers. Inasmuch as the Commission's determination is based on a correct rule of law, and is supported by a rational basis and substantial evidence, it is binding upon this Court. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146; *Gray v. Powell*, 314 U. S. 402, 411-412; *Securities Commission v. Chenery Corp.*, 318 U. S. 80, 99; *Thomson v. United States*, 321 U. S. 19, 23; *Cornell Steamboat Co. v. United States*, 321 U. S. 634, 637-638.

### III

Even if it should be held that appellee was not entitled to common carrier status, or that a common carrier may not lawfully be granted operating authority confined to commodities moving on bills of lading of freight forwarders, the district court erred in setting aside the portion of the Commission's order containing the limitation to such commodities, while leaving the rest of the order in force. The court thereby undertook to grant appellee operating authority different from that granted by the Commission, and in so doing undertook to exercise an administrative function conferred on the Commission by Congress. The Commission's order was indivisible, and courts may not substitute a different plan for trans-



portation operations. *Chesapeake & Ohio Ry. Co. v. United States*, 35 F. (2d) 769, 774 (S. D. W. Va.), affirmed, 283 U. S. 35. If the Commission's order ~~was~~ based upon an improper application of legal standards, the case should have been remanded to the Commission for appropriate action by that body in the light of applicable law. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618-619, 622. To determine the scope and character of the operating authority as a motor carrier which should be granted to appellee is not a judicial, but an administrative function, entailing not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 484, 489-490.

#### ARGUMENT

##### I

#### THE APPEAL WAS TAKEN IN THE PROPER MANNER AND IN DUE TIME

The appeal herein was allowed by Judge Baltzell, one of the members of the three-judge court, on July 22, 1944, more than 30 days but within 60 days after the district court's decree of May 25, 1944. Appellee argues that an appeal in cases of this sort may not be allowed by a single judge,

but must be allowed by a majority of the three-judge court hearing and determining the case; and appellee also argues that the appeal must be taken within 30 days after the date of the decree. We believe that these contentions are unsound.

#### A. ALLOWANCE OF APPEAL BY A SINGLE JUDGE IS PROPER

Although the Act of October 22, 1913 (38 Stat. 220, 28 U. S. C. 47), prescribes in considerable detail both the trial and appellate procedure to be followed in suits to set aside orders of the Commission, there is no language to be found indicating that the action of three judges, or a majority of them, is necessary in order that an appeal may be validly allowed. The silence of the statute is significant. The requirement that an application for an interlocutory injunction "shall be heard and determined by three judges," and that "upon the final hearing \* \* \* the same requirement as to judges \* \* \* shall apply" (38 Stat. 220, 28 U. S. C. 47) distinguishes those stages of the litigation from that which follows rendition of a final judgment or decree and negates the possibility that such procedure should be regarded as applicable except where expressly prescribed.

The failure of Congress to provide specifically for the assembly of three judges to allow an appeal was not inadvertent. The granting of an

appeal, when, as here, it is a matter of right, is purely a ministerial act. It is not, in fact, the actual granting of the appeal which results in the taking of an appeal, but only the filing of a petition for appeal and thus it has been held that an appeal is timely if the petition is timely filed, even though the appeal is not granted within the prescribed time. *United States v. Vigil*, 10 Wall. 423, 427; *Latham v. United States*, 131 U. S. Appendix, XCVII; cf. *Matton Co. v. Murphy*, 319 U. S. 412, 414. The granting of an appeal is unlike the hearing and determining of the case either at the interlocutory or the final stage, where the questions involved were deemed by Congress to be sufficiently important from the standpoint of the public interest to make it undesirable to entrust the decision of such issues to a single judge.

Again, it has been the consistent and usual practice in taking appeals to this Court in this type of case to have the appeal allowed by a single judge. In *Tagg Bros. v. United States*, 280 U. S. 420, 433 the opinion recites that "The District Judge allowed an appeal to this Court."

A footnote on the same page states:

In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. \* \* \*

This indicates that this Court thought that the single judge's action, insofar as it involved the granting of the appeal, was perfectly proper. Furthermore, examination of the printed records in some of the Commission's cases which have come before this Court in the present and past two Terms reveals that the appeals in the following cases were allowed by but one judge: *Interstate Commerce Commission v. Inland Waterways*, 319 U. S. 671; *Interstate Commerce Commission v. Hoboken R. Co.*, 320 U. S. 368; *City of Yonkers v. United States*, 320 U. S. 685; *Thomson v. United States*, 321 U. S. 19; *McLean Trucking Co. v. United States*, 321 U. S. 67; *United States v. Wabash R. Co.*, 321 U. S. 403; *Cornell Steamboat Co. v. United States*, 321 U. S. 634; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1; *United States v. Marshall Transport Co.*, 322 U. S. 31; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503; *United States v. Pennsylvania R. R. Co.*, Nos. 47-48 this Term, decided January 29, 1945; *Pennsylvania R. R. Co. v. United States*, No. 182 this Term, decided January 29, 1945. This practice would seem authorized under Rule 36 of the rules of this Court, providing that, "In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

Finally, any doubt that may have existed on this score was effectually removed by Section 3 of the Act of April 6, 1942. (56 Stat. 198-199, '28 U. S. C. Supp. III 792).<sup>3</sup> This Section provides that in a case of this type a single judge may "enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory

<sup>3</sup> Section 3 provides:

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3 (being, respectively, secs. 380, 47, and 380a of title 28, U. S. C.), or the Act of February 11, 1903 (32 Stat. 823; U. S. C., 1940 edition, title 15, sec. 28 and title 49, sec. 44), as amended by section 1 of this Act, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action: *Provided, however,* That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion."



injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action \* \* \*." Under the Rules of Civil Procedure a single judge is permitted to grant an appeal to this Court. Thus, Rule 72 provides that an appeal from a district court to the Supreme Court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal," and, as above indicated, Rule 36 of the rules of this Court authorizes the granting of an appeal to this Court from a district court by a single judge.

#### B. APPEAL MAY BE TAKEN IN SIXTY DAYS FROM FINAL DECREE

That an appeal may be taken within 60 days after the entry of final judgment or decree in a case brought to set aside an order of the Interstate Commerce Commission is likewise clear. The Urgent Deficiencies Act of October 22, 1913, expressly so provides (38 Stat. 220, 28 U. S. C. 47a).

The proviso that the single judge's action is subject to review "at any time prior to final hearing" by the court as constituted for final hearing (fn. 3, *supra*, p. 16) merely shows that after final hearing his action is not reviewable by his colleagues; it does not, as appellee argues, indicate that the powers conferred on the single judge by the statute are limited to those exercisable prior to final hearing. The quoted words are a limitation, not upon the authority of the single judge, but upon that of the three judges as a reviewing body. The proviso is an indication, rather, that after final hearing there is no occasion for action by three judges, and hence confirms the conclusion that an appeal may be allowed by a single judge.

That statute, after abolishing the Commerce Court and transferring its jurisdiction to the several district courts, specified that "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court" and that "the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court" (38 Stat. 220). It was further provided that no interlocutory injunction setting aside any order of the Interstate Commerce Commission should be granted, except after a hearing before a court of three judges, one of whom must be a circuit judge, such hearing to be given precedence and expedited in every way. With respect to final hearing and appeals, the Act reads as follows (*ibid.*):

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment

or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. \* \* \*

The first sentence above quoted from the Urgent Deficiencies Act appears in the United States Code as part of Title 28, Section 47, while the last sentence, apparently omitted through inadvertence of the compilers when the Code was originally published, was added, with the compilers' addition of the phrase "in the cases specified in section 44 of this title [28]",<sup>5</sup> in the 1934

<sup>5</sup> The sentence immediately following the quoted language is "And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State" (38 Stat. 220-221). A similar sentence appears in 28 U. S. C. 47a (Appendix, *infra*, pp. 53-54). Accordingly, in cases of this sort, the appellant is required to serve the Attorney General of the State in which the district court is located. The Government and the Commission, the appellants, followed this practice (R. 78-79). Cf. fn. 15, *infra*, p. 30.

<sup>6</sup> Section 47a of Title 28 provides:

"A final judgment or decree of the district court in the cases specified in section 44 of this title [28] may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. \* \* \*"  
[Italics supplied.]

Section 44 of Title 28 in turn provides in part:

"The procedure in the district courts \* \* \* in respect

edition and retained thereafter as part of Section 47a of Title 28.

The two sentences are consecutive in the statute as enacted, and are obviously to be read and construed together. In prescribing in the second sentence a specific period of 60 days for taking an appeal from final decrees, Congress undoubtedly must have meant the language used to be applicable to final decrees in the type of case about which it had been speaking in the preceding sentence, that is, in suits to set aside orders of the Interstate Commerce Commission. If this is true, the second sentence quoted above was reaffirmed (and not repealed, as appellee contends) by the Act of February 13, 1925 (43 Stat. 936). Section 1 of that Act amended Section 238 of the Judicial Code to read in part as follows:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise;

---

to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a and 48 of this title."

Read together, the two Sections provide for sixty days within which to appeal to the Supreme Court from a final judgment or decree of a district court in cases where, as here, a party has sought judicial review of an order of the Interstate Commerce Commission.

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money. (43 Stat. 938)<sup>7</sup>

Only if appellee succeeds in demonstrating that the second sentence quoted above (pp. 18-19) from the Urgent Deficiencies Act (38 Stat. 220) is not a portion which "relates to the review of interlocutory and final judgments and decrees in suits to \* \* \* suspend, or set aside orders of the Interstate Commerce Commission" can the contention that it was repealed by the Act of February 13, 1925, be advanced with any degree of plausibility.

Appellee's contention is that the second sentence (the basis for the language now substantially found in 28 U. S. C. 47a) does not relate to appeals in suits to set aside orders of the Commission, but relates only to appeals in other types of cases which were formerly within the jurisdic-

<sup>7</sup> Section 13 of the Act of February 13, 1925, provided in part:

"That the following statutes and parts of statutes be, and they are, repealed:

"All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith" (43 Stat. 941, 942).



tion of the Commerce Court and were transferred to the district courts by the Urgent Deficiencies Act. In other words, appellee contends that this sentence found in the Urgent Deficiencies Act does not apply to appeals in the type of cases which must be heard before a district court composed of three judges, but refers solely to matters which, having been brought within the jurisdiction of the district court by the Urgent Deficiencies Act, may be disposed of in that court with a single judge sitting. But nothing in the language of the Urgent Deficiencies Act, or in its legislative history, or in judicial decisions thereunder, supports appellee's interpretation.

If the second sentence quoted from the Urgent Deficiencies Act must be interpreted as applicable to one particular type of cases transferred from the Commerce Court, and not to all such cases, it would seem that suits in a three-judge court to set aside the Commission's orders are precisely the type of case to which the sentence does apply.<sup>8</sup> This is so because it was the necessity of providing for trial and appellate procedure in such suits that

---

<sup>8</sup> But even if the second sentence be interpreted as applying only to cases within the Commerce Court's jurisdiction other than those brought to set aside an order of the Commission, it would not be repealed by the Act of February 13, 1925. Under that interpretation it would apply, *inter alia*, to suits "for the enforcement \* \* \* of any order of the Interstate Commerce Commission other than for the payment to suits to enforce \* \* \* orders of the. from repeal. In *St. Louis & O'Fallon Ry. Co. v. United States*, 279 U. S. 461, 482, it was said that notwithstanding

furnished the occasion for enactment of the entire paragraph of the Urgent Deficiencies Act containing that sentence.

The Mann-Elkins Act of July 18, 1910 (36 Stat. 539), which established the Commerce Court, conferred upon it jurisdiction over four kinds of cases:<sup>9</sup> (1) suits to enforce certain orders of the

the amendments to Section 238 of the Judicial Code made by the Act of February 13, 1925, this Court has jurisdiction on appeal of "any cause formerly cognizable by the Commerce Court" brought to enforce or set aside an order of the Interstate Commerce Commission.

<sup>9</sup> In Section 1 of the Mann-Elkins Act, it was provided:

"\* \* \* That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States" (36 Stat. 539).

Interstate Commerce Commission (see 28 U. S. C. 41 (27)); (2) suits to enjoin, set aside, annul, or suspend orders of the Commission (see 28 U. S. C. 41 (28)); (3) certain suits under Section 3 of the Interstate Commerce Act (as amended by the Act of February 19, 1903, 32 Stat. 848, 49 U. S. C. 43) to prevent unjust discriminations; (4) certain mandamus proceedings under Section 20 (as amended by the Act of June 29, 1906, 34 Stat. 590-5, 49 U. S. C. 20 (9)) and Section 23 (as added by the Act of March 2, 1889, 25 Stat. 862, 49 U. S. C. 49) of the Interstate Commerce Act.

Section 2<sup>10</sup> of the Mann-Elkins Act (36 Stat. 539, 542) provided for review by this Court of

<sup>10</sup> This Section became Section 210 of the Judicial Code (36 Stat. 1150), reading as follows:

"Sec. 210. A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunc-

decisions of the Commerce Court. Such appeals were to be taken within 60 days from final judgment or decree, and within 30 days from an interlocutory order or decree granting or continuing an injunction restraining the enforcement of an order of the Commission. These periods were the same as had prevailed under Section 5 of the Hepburn Act (34 Stat. 584, 592; see also 32 Stat. 823) dealing with reviews of orders of the Commission by three-judge circuit courts. Until the Hepburn Act was enacted in 1906, the Commission's orders were not reviewable by those subject thereto, since its orders were only enforceable by judicial action. See 1 Sharfman, *The Interstate Commerce Commission* (1931), 22-24, 27.

When the Urgent Deficiencies Act transferred to the district courts the jurisdiction theretofore exercised by the Commerce Court, it provided that "the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court" (38 Stat. 220). This language, together with the provisions of Section 2 of the Mann-Elkins Act (Section 210 of the

---

tion restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court."

Judicial Code, fr. 10, *supra*, p. 24) would have been sufficient to deal with appeals in all cases embraced within the transferred jurisdiction other than suits requiring a hearing before three judges (see *supra*, p. 24). Consequently, nothing in the subsequent language of the paragraph of the Urgent Deficiencies Act which forms the basis of 28 U. S. C. 47 and 28 U. S. C. 47a was enacted for the purpose of dealing with appeals from cases to be heard henceforth by a single judge. All the provisions of that paragraph, including Section 47a, were made necessary by the fact that for the second item of transferred jurisdiction (suits to set aside the Commission's orders) Congress decided to establish a type of procedure requiring hearing by a district court composed ordinarily of a circuit court of appeals judge and two district judges.

When the Commerce Court, a tribunal of five judges, ceased to be the agency for review of orders of the Commission, Congress was of the opinion that such review was a function too important to be entrusted to a single judge. See Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), p. 11. The three-judge court was a tribunal already employed in certain suits under the Interstate Commerce Act (see 32 Stat. 823; 34 Stat. 584, 592) and in certain suits under Section 17 of the Mann-Elkins Act.<sup>11</sup> It was there-

<sup>11</sup> Section 17 of the Mann-Elkins Act (36 Stat. 537) provided for an expedited hearing by a certain type of three-judge court on applications for an interlocutory injunction



fore natural for Congress in 1913 to adopt ~~this~~ as a suitable method of providing for judicial review of the Commission's orders ~~by~~ a three-judge court, whose composition, however, was of a new type.

The legislative history of the Urgent Deficiencies Act shows that the entire passage (38 Stat. 220) quoted above (pp. 18-19) was the logical outgrowth of the adoption of the new type of three-judge court as the reviewing tribunal for orders of the Commission. When this new mode of handling the Commission's cases was adopted, it became necessary for Congress to regulate the functioning of such specially constituted district courts and to provide for appeals from their decisions. The provisions theretofore in force relating to procedure in and appeals from the Commerce Court of course did not cover the subject of procedure in and appeals from this type of three-judge court,

suspending or restraining the enforcement of a state statute. This provision was carried forward as Section 266 of the Judicial Code of March 3, 1911 (36 Stat. 1162), and was subsequently amended by the Act of March 4, 1913 (37 Stat. 1013). The Act of February 13, 1925 (43 Stat. 938) provided that in cases under Section 266 "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Another type of three-judge expediting court for equity suits brought by the United States under the Sherman Antitrust Act and the Interstate Commerce Act had previously been created under the Act of February 11, 1903 (32 Stat. 823), amended by the Act of June 25, 1910 (36 Stat. 854).

which type was not established for purposes of reviewing orders of the Commission until the enactment of the Urgent Deficiencies Act itself. Consequently, Congress prescribed specific rules in that regard, including the two sentences heretofore quoted (pp. 18-19). The first sentence provided for direct appeals to the Supreme Court from interlocutory decisions, specified 30 days as the time limit for taking such appeals, and also prescribed that on final hearing the same requirement as to judges and the same procedure as to expedition and appeal should apply. This language as to appeal after final hearing is obviously to be interpreted as meaning that appeal in such cases shall be direct to the Supreme Court. Such direct appeal is the usual rule in all three-judge matters, and the context reveals that such an appeal was meant in this part of the statutory language. However, the time for taking the appeal after final hearing is governed by the second sentence, which specifies 60 days.

By prescribing time limits of 30 and 60 days, respectively, for appeals from interlocutory and final decisions in three-judge cases involving review of the Commission's orders, Congress brought the appellate procedure of this newly established type of three-judge court into uniformity with the rules as to time for appeal which had governed appeals from the Commerce Court in the same type of cases. Appellee's contention, without warrant in the legislative history of the Urgent Deficiencies

Act, attributes to Congress an intention to change the period of time for appeals from final decisions in cases involving the Commission's orders, and thus to destroy such uniformity.

The paragraph relating to three-judge courts which appears in the Urgent Deficiencies Act originated in substantially its present form in the bill as submitted by Mr. Fitzgerald, Chairman of the House Committee on Appropriations.<sup>12</sup> As then worded, three-judge procedure would have been required for any "preliminary injunction, or restraining or stay order," and a direct appeal would have been permitted from the order "granting" such relief. In the Senate, the requirement of three judges was limited to "interlocutory" injunctions, and a single judge was empowered to issue temporary restraining orders under certain conditions.<sup>13</sup> An appeal was also provided from the denial, as well as granting, of an interlocutory injunction. The intent of the Senate Appropriations Committee was to apply the procedure of Section 266 of the Judicial Code (see fn. 11, *supra*, p. 26) to cases involving orders of the Interstate Commerce Commission, adding certain stay provisions derived from Section 3 of the Mann-Elkins

<sup>12</sup> H. Rep. No. 64, 63rd Cong., 1st Sess.; 50 Cong. Rec. 4527, 4622.

<sup>13</sup> See S. Rep. No. 116, 63rd Cong., 1st Sess., and accompanying print of the bill dated October 2, 1913. The Senate's amendments are designated by number in the print of October 7, 1913, for use of the House.

Act (36 Stat. 542-543).<sup>14</sup> The sentence regarding appeals from final decisions was changed by substituting the words "in equity cases" in place of the words "from the Commerce Court to the Supreme Court"; following the provision that "such appeals may be taken in like manner as appeals are taken under existing law \* \* \*." See *supra*, pp. 18-19. At the suggestion of Senator Walsh of Montana, a sentence relating to injunctions against state administrative agencies was omitted as being inappropriate in a bill dealing with orders of the Interstate Commerce Commission.<sup>15</sup> The foregoing amendments, as well as others not pertinent here, were accepted in the Conference Report.<sup>16</sup>

Examination of the legislative history of the Act of February 13, 1925 (*supra*, pp. 20-21), which appellee asserts repealed 28 U. S. C. 47a, indicates that Congress did not intend to change the existing law concerning the time for taking such appeals as that involved herein. At the Hearings on H. R.

<sup>14</sup> 50 Cong. Rec. 5407-8. These changes were embraced in Senate Amendment No. 64. Cf. 50 Cong. Rec. 5425, 5594.

<sup>15</sup> 50 Cong. Rec. 5498. These changes were embraced in Senate Amendment No. 65. It would seem that the following sentence, also relating to suits against state agencies, should likewise have been omitted from the bill, and it was deleted by the amendment voted (50 Cong. Rec. 5409), but it was permitted to remain in the law as enacted: "And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State" (38 Stat. 220-221). See fn. 5, *supra*, p. 19.

<sup>16</sup> Conference Rep. No. 91, 63rd Cong., 1st sess.; 50 Cong. Rec. 5551, 5612.

8206, which was a basis for the Act of 1925, Mr. Justice Van Devanter stated:

The nature of the cases within these classes and the fact that the hearing is required to be before three judges are believed to make it appropriate that the existing right to review in the Supreme Court in such cases should be preserved. (Hearings, H. Committee on the Judiciary, H. R. 8206, 68th Cong., 1st sess., p. 15)

See also Mr. Justice McReynolds' substantially similar statement (*ibid.*, p. 22).

The report of Senator Cummins, Chairman of the Senate Committee on the Judiciary, on S. 2060,<sup>17</sup> which became the Act of February 13, 1925, contains the following statement:

As is well known, there are certain cases which, under the present law, may be taken directly from the district court to the Supreme Court. Without entering into a description of these four classes of cases, it is sufficient to say that under the existing law these are cases which must be heard by three judges, one of whom is a circuit judge. The bill does not change the jurisdiction of the Supreme Court in such cases.

There was little debate, but Senator Cummins did state that an amendment (contained in the Act of 1925) dealing with the Packers and Stock-

<sup>17</sup> S. 2060, which was substituted for H. R. 8206, was substantially the same as the House bill (Hearings, H. Committee on the Judiciary, H. R. 8206, 68th Cong., 1st sess., p. 16; 66 Cong. Rec. 2925).



yards Act of 1921 (7 U. S. C. 191-231) did not limit in any respect the right of review of either interlocutory or final judgments of district courts in the other classes of cases directly reviewable (66 Cong. Rec. 2917).

Thus nothing in the language or the legislative history of the Urgent Deficiencies Act or of the Act of February 13, 1925, supports appellee's contentions. Moreover, the decisions of this Court and its uniform practice demonstrate that appellee's position is untenable.

In *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 23, this Court in 1933 referred to 28 U. S. C. 47a as being included among the statutory provisions which then remained in force. Furthermore, if appellee's contentions are correct, a very large proportion of appeals in suits to set aside orders of the Commission have been improperly granted, and this Court has decided many cases over which it had no jurisdiction. A review of the printed records and briefs in this Court in the present and past two Terms alone in cases involving the Commission indicates that in the following instances the appeals were taken more than 30 days, but within 60 days, after the final decree: *L. T. Barringer & Co. v. United States*, 319 U. S. 1; *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission v. Inland Waterways*

*Corp.*, 319 U. S. 671; *Interstate Commerce Commission v. Hoboken R. Co.*, 320 U. S. 368; *Crescent Express Lines v. United States*, 320 U. S. 401; *McLean Trucking Co. v. United States*, 321 U. S. 67; *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U. S. 194; *United States v. Wabash R. Co.*, 321 U. S. 403; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1; *United States v. Marshall Transport Co.*, 322 U. S. 31; *United States v. Pennsylvania R. R. Co.*, Nos. 47-48 this Term, decided January 29, 1945; *Pennsylvania R. R. Co. v. United States*, No. 182 this Term, decided January 29, 1945. And in the *Columbus & Greenville Ry.* case, the appellee made the same contention as is made in the case at bar in support of a motion to dismiss the Commission's appeal or affirm. While no specific action was taken on the motion, the Court proceeded to decide the case on the merits and thus impliedly rejected the contention.

Appellee, referring to the statement made by this Court in *Virginian Ry. v. United States*, 272 U. S. 658, 672, that the Urgent Deficiencies Act had shortened the appeal time,<sup>18</sup> asserts that the

<sup>18</sup> The Court in the passage referred to was comparing Section 266 of the Judicial Code and the provisions of the Urgent Deficiencies Act, with particular reference to the power of the district court to grant a stay pending appeal, and said:

"The character of the proceeding and the end sought are the same in the two statutes. The two provisions origi-

Court meant that the Urgent Deficiencies Act had reduced the appeal time from 60 days to 30 days. It appears, however, that the Court meant only that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time (see 28 U. S. C. 350).

In view of the foregoing discussion, it is submitted that the specific terms of 28 U. S. C. 47a govern the period of taking an appeal, and that the present appeal was taken in due time and in the proper manner, thereby establishing this Court's jurisdiction.

nated in the same Act. Section 266 is a codification of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 557. The provision of the Act of 1913, here in question, is an adaptation to the district courts of § 3 of the Act of 1910, which prescribed the procedure for such applications before the Commerce Court. No reason is suggested why the rule governing in cases of appeals from the district court under § 266 should not apply also to appeals from those courts under the Act of 1913. Moreover, the latter Act, in referring in the same connection to appeals from final decrees, declares that "such appeals may be taken in like manner as appeals are taken under existing law in equity cases." Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of the writs of injunction in cases of this character by the provisions which require action by the court of three judges, which permit of expediting the hearings before the district court, which shorten the period of appeal, and which give a direct appeal to this Court." [272 U. S. at 672.]

THE COMMISSION MAY GRANT OPERATING AUTHORITY  
CONFINING APPELLEE TO TRANSPORTATION OF COM-  
MODITIES "MOVING ON BILLS OF LADING OF FREIGHT  
FORWARDERS"

The principal question for determination is whether the Commission may lawfully grant to appellee operating authority confined to transportation of commodities "moving on bills of lading of freight forwarders," that being the only type of traffic transported by appellee's predecessor in interest during the "grandfather" period. It is believed that appellee has no standing to raise this question, for in its petition to the Commission for reconsideration (R. 127-144), appellee complained of the Commission's report and order (R. 40-50) only with respect to the limitation of the territorial scope of its operations. Appellee expressly waived (R. 129, see also R. 144) objection to the restriction limiting it to the carriage of traffic moving on bills of lading of freight forwarders. Since appellee failed to exhaust its administrative remedies,<sup>19</sup> the district court should

<sup>19</sup> See *Yakus v. United States*, 321 U. S. 414, 434; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310, 311; *Porter v. Investors Syndicate*, 286 U. S. 461, 468, 471; *Board of Railroad Commissioners v. Great Northern Ry.*, 281 U. S. 412, 424; *Great Northern Ry. v. Merchants Elevator Co.*, 259 U. S. 285-291; *United States v. Sing Tuck*, 194 U. S. 161, 168; *Carolina Scenic Coach Lines v. United States*, 56 F. Supp. 801, 804-805 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637, present Term; *Board of Public Utility*

not have passed upon the validity of the restriction prescribed by the Commission.<sup>20</sup> In any event, we maintain that the Commission may properly grant such authority, and indeed that under applicable law and the facts of the case it would not have been permissible for the Commission to grant appellee the more extensive authority which the district court undertook to confer.

The Commission's finding that during the "grandfather" period appellee's predecessor in interest transported no commodities other than those moving on bills of lading of freight forwarders cannot be challenged by appellee. Having chosen not to offer in evidence in this case the record made in the proceedings before the Commission, appellee may not question the facts as found by the Commission. *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286. Nor may appellee collaterally attack the full Commission's findings here by referring to Division 4's report in the proceeding involving appellee's acquisition of Globe, where it was said, as of May 16, 1942, that only "approximately

*Com'rs. v. United States*, 21 F. Supp. 543, 549 (D. N. J.); cf. *Chicago, St. P. & O. Ry. Co. v. United State*, 322 U. S. 1, 3-4; see also Berger, *Exhaustion of Administrative Remedies* (1939), 48 Y. L. J. 981.

<sup>20</sup> Appellants raised this point in the court below (R. 58, 98-99), even in their proposed findings of fact (R. 63) which the district court refused to adopt (see R. 65-73). The assignment of errors, *inter alia*, alleges that the district court erred in not adopting such findings of fact (R. 75).



65% of Globe's traffic" consisted of business handled for Universal Carloading & Distributing Company (R. 102; 38 M. C. C. at 384). Even if this statement in the acquisition case referred to the traffic handled by Globe on June 1, 1935, the "grandfather" date, rather than on a date almost seven years thereafter, it could not be relied on by appellee. The subsequent finding made by the full Commission in a proceeding directed specifically toward determination of the scope of Globe's rights under the "grandfather clause" would necessarily prevail over the earlier statement made by Division 4 in connection with a collateral proceeding dealing only with the propriety of approving appellee's acquisition of Globe's rights. Courts are not concerned with the correctness of the Commission's reasoning, or the consistency or inconsistency of its decision in a particular case with prior decisions which it has rendered. *Virginian Railway Co. v. United States*, 272 U. S. 658, 663; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271; *Georgia Public Service Commission v. United States*, 283 U. S. 765, 775; cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602.

In the light of the Commission's finding of fact that during the "grandfather" period the only traffic transported by appellee's predecessor in interest was traffic moving on bills of lading of freight forwarders, it is obvious that a more extensive operating authority such as the district

court undertook to grant, not confined to transportation of commodities moving on bills of lading of freight forwarders, would not be compatible with the terms of the "grandfather" clause of the Act as repeatedly construed by this Court. The broad authority which the district court undertook to confer upon appellee would permit transportation by appellee of commodities generally, whether they were moving on bills of lading of freight forwarders or not. This would constitute a substantial change in the character of the operation, and would permit appellee to engage in different traffic transportation than that which its predecessor in interest handled during the "grandfather" period. Such an expansion or enlargement of the enterprise would be improper, and would permit appellee to occupy a much more advantageous position in the transportation industry than it would be entitled to on the basis of the operation as conducted during the "grandfather" period. *United States v. Maher*, 307 U. S. 148, 155; *Noble v. United States*, 319 U. S. 88, 92; *Crescent Express Lines v. United States*, 320 U. S. 401, 408-409. The "grandfather" clause granted to carriers entitled to its benefits only "substantial parity" between future operations and prior *bona fide* operations. *Alton Railroad Co. v. United States*, 315 U. S. 15, 22; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481; *Noble v. United States*, 319 U. S. 88, 92; *Crescent Express Lines v. United States*, 320 U. S.

401, 409. As the "grandfather" clause confers a special privilege, constituting an exception to a scheme of regulation required in the public interest and established by a remedial statute, this "grandfather" proviso determining exemptions from the necessity of proving public convenience and necessity is to be held to extend only to carriers plainly within its terms. *McDonald v. Thompson*, 305 U. S. 263, 266; *Gregg Cartage Company v. United States*, 316 U. S. 74, 83.

Besides the "grandfather" clause, further statutory authority supporting the limitation specified by the Commission is found in the provision of Section 208 (a) <sup>21</sup> of the Act making it the duty

<sup>21</sup> Section 208 (a) provides (49 U. S. C. 308 (a)):

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

of the Commission to "specify the service to be rendered" by the carrier receiving a certificate issued under the "grandfather" clause. That language justifies the Commission's action in confining appellee to transportation of the type of traffic handled during the "grandfather" period. In *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 483, it was recognized that under this provision the Commission may properly grant operating authority limited to carriage of particular commodities when it is clear that the applicant's holding out during the "grandfather" period was actually thus restricted. Moreover, in *Crescent Express Lines v. United States*, 320 U. S. 401, 408, it was held that under this Section the Commission could restrict a carrier to the type of vehicles used during the "grandfather" period. Likewise, in *Noble v. United States*, 319 U. S. 88, this Court sustained an order of the Commission restricting, under the closely comparable language of Section 209 (b),<sup>22</sup> a contract carrier's operating authority to the transportation of the enumerated commodities for the particular types of shippers served during the "grandfather" period.

In numerous instances of motor-carrier service rendered by railroads or railroad subsidiaries in connection with plans to provide coordinated rail-

<sup>22</sup> Section 209 (b) provides that "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof" (49 U. S. C. 309 (b)).

motor service, the Commission has granted operating authority containing, among other restrictions, a provision that the transportation performed shall be confined to commodities moving on railroad bills of lading. *E. g., Kansas City Southern Transport Co., Inc., Common Carrier Application*, 10 M. C. C. 221, 240; *Seaboard Air Line Railway Co. Motor Operation*, 17 M. C. C. 413, 433; *Chicago, Rock Island & Pacific Railway Co. Extensions*, 19 M. C. C. 702, 706-707; *Louisiana, Arkansas & Texas Railway Co., Common Carrier Application*, 22 M. C. C. 213. One such instance was considered in *Thomson v. United States*, 321 U. S. 19, and apparently received the tacit approval of the Court. The principal question considered in that case was whether the railroad or the truck operators actually performing the hauling should receive the operating authority, but no one asserted that the motor transportation authorized should not be limited to commodities moving on railroad bills of lading, as the Commission had done (31 M. C. C. 299, 306).

The district court refused to sustain the limitation primarily on the ground (Finding of Fact No. 19, R. 73) that the Commission's report contained no finding that the limitation was a reasonable one required by the public convenience and necessity. Perhaps such a finding might have been necessary if the Commission had been exercising its power under that portion of Sec-



tion 208 (a) which authorizes it to attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require," as when it requires an applicant to perform certain service in addition to that which it had performed during the "grandfather" period. Cf. *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1. Here, however, it is evident that the Commission was not exercising such power, but, as in *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 483, and *Crescent Express Lines v. United States*, 320 U. S. 401, 408-409,<sup>23</sup> was only endeavoring to "specify the service to be rendered" (sec. 208 (a)) in order to bring substantial parity between the type of service authorized in the grant and that conducted during the "grandfather" period. (See R. 45.)

It is submitted that the Commission was correct in concluding that Globe, appellee's predecessor, was a common rather than a contract carrier and that the restriction imposed was not inconsistent with its common carrier status. The Commission recognized that for Globe to have been a common carrier under the Act it must have held itself out to transport for the general public.<sup>24</sup> The Com-

<sup>23</sup> Cf. *United States v. Maher*, 307 U. S. 148, 155; *Noble v. United States*, 319 U. S. 88, 91-92.

<sup>24</sup> Section 203 (a) (14) defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage in \* \* \* transportation \* \* \* (49 U. S. C. 303 (a) (14)).

mission found that the forwarder for which Globe transported dealt with the shipping public in general and did not limit its activities to selected shippers; that Globe transported the property of the shipping public in general which was assembled by the forwarder as the result of the latter's undertaking to have the same transported; and it concluded that Globe, through the freight forwarder as an intermediary, held itself out to the general public to engage in the transportation of property by motor vehicle (R. 42, 44; 42 M. C. C. at 548, 550). The fact that Globe restricted its undertaking to service furnished through freight forwarders was simply an indication that it wished to deal with the public in a particular manner and to restrict its transportation service to commodities moving on bills of lading of freight forwarders. Common carriers frequently limit their undertaking to particular commodities; or to traffic moving in certain quantities, or packed in a particular manner. Globe doubtless desired to engage only in transportation of traffic moving in truckload lots, and to accomplish this objective of eliminating less-than-truckload business it handled only traffic which had been assembled by freight forwarders. This restriction is analogous to a restriction limiting the service offered by a carrier to truckload shipments, or shipments of a certain minimum weight, or to commodities packed in a certain manner. None of these restrictions is inconsistent with the

common carrier status of the motor carrier. The statutory definition of "common carrier by motor vehicle" in Section 203 (a) (14) in fact specifically recognizes that a carrier may be engaged in the transportation of only a certain "class or classes" of property (see Appendix, *infra*, p. 55).

The Commission's decision is in accord with its consistent holdings in numerous other cases that persons hauling only for freight forwarders are, nevertheless, common carriers and not contract carriers. See, e. g., *American Motor Dispatch Inc., Common Carrier Application*, 26 M. C. C. 346; *Bleich Common Carrier Application*, 27 M. C. C. 9; *Hoey Cartage Co., Contract Carrier Application*, 28 M. C. C. 102. This rule developed because the Commission long recognized, as it did here (R. 43-44; 42 M. C. C. at 550), that freight forwarders occupy a different position from that of the ordinary shipper who tenders his own goods to a carrier for transportation. The forwarder merely tenders for transportation freight belonging not to itself but to the general public, which it has accepted and assembled as the result of an understanding with many shippers or consignees that it will undertake to have the property transported to its ultimate destination. By consolidating shipments for many shippers the freight forwarder is able to secure for such shippers the benefit of carload and truckload rates, which are generally lower than less-than-carload and less-than-truckload rates. The Commission

has held that freight forwarders are not common carriers by rail or motor vehicle nor express companies, but that they are nevertheless common carriers of another type at common law,<sup>25</sup> and in 1942, Part IV of the Interstate Commerce Act (56 Stat. 284, 49 U. S. C. Supp. III, 1001-1022) brought them within the regulatory jurisdiction of the Commission. The situation here is also analogous to that of the Union Stockyards in Chicago. In *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, 220, this Court held that the appellant company was a common carrier by railroad insofar as it loaded and unloaded livestock at its stockyard, though it dealt directly only with other carriers, the railroads, and acted as their agents.

It is evident, therefore, that the Commission in concluding that Globe was a common carrier and that the restriction limiting appellee to the type of operation performed by Globe did not change its common carrier status, applied the correct rule of law, and that its conclusion is supported by a rational basis and substantial evidence. There was an expert administrative determination by the Commission, which, under the above circumstances, is binding upon this Court.

<sup>25</sup> See *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211, 227-228, affirmed, *Acme Fast Freight v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam*, 309 U. S. 638; *Freight Forwarding Investigation*, 229 I. C. C. 201, 303-4.

*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146; *Gray v. Powell*, 314 U. S. 402, 411-412; *Securities Commission v. Chenery Corp.*, 318 U. S. 80, 99; *Thomson v. United States*, 321 U. S. 19, 23; *Cornell Steamboat Co. v. United States*, 321 U. S. 634, 637-638; see also Stern, *Review of Findings* (1944), 58 Harv. L. Rev. 70, 99.

### III

#### THE DISTRICT COURT IMPROPERLY EXERCISED THE COMMISSION'S FUNCTIONS

Even if it were to be held that the appellee was not a common carrier, or that it would be inconsistent with appellee's common carrier status for the Commission to grant operating authority confined to transportation of commodities moving on bills of lading of freight forwarders, nevertheless the district court erred in enjoining (R. 73) that part of the Commission's order confining appellee's operations to transportation of such commodities. The district court thus undertook to permit appellee to exercise operating authority different from that granted by the Commission, and to engage in operations different from those which the Commission found *Globe*, appellee's predecessor, was performing during the "grandfather" period. In setting aside only the commodity restriction while leaving the order otherwise in effect, the district court undertook to exercise the administrative function



entrusted by Congress to the Commission of determining in the first instance the scope of the operating authority to be issued. The district court's action was contrary to the rule laid down in *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 484, 489-90:

It is not our function to weigh the evidence. Hence we intimate no opinion as to whether more commodities should have been included had the proper criterion been employed. \* \* \*

We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission.

If, as a matter of law, the Commission's order did not apply the proper statutory standards, the case should have been sent back to the Commission for an appropriate determination, in the light of applicable rules of law, of the transportation questions involved. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618-619, 622. Under the views which the Commission entertained as to its powers, it rendered an indivisible order. For the district court to permit appellee to transport commodities generally, without regard to whether they were moving on bills of lading of freight forwarders or not, would be to

transform completely the type of operating authority granted by the Commission, and "would make a basic alteration in the characteristics of the enterprise" of the carrier. *Noble v. United States*, 319 U. S. 88, 92. Such a modification in the nature and scope of the operating authority granted would be similar to the adoption of an entirely different plan for transportation operations, which the court correctly refused to do in *Chesapeake & Ohio Ry. Co. v. United States*, 35 F. (2d) 769, 774 (S. D. W. Va.), affirmed, 283 U. S. 35.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

CHARLES FAHY,  
*Solicitor General.*

WENDELL BERGE,  
*Assistant Attorney General.*

ROBERT L. PIERCE,  
EDWARD DUMBAULD,  
*Special Assistants to the Attorney General.*

WALTER J. CUMMINGS, Jr.,  
*Attorney.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*

NELSON THOMAS,  
*Attorney,*

*Interstate Commerce Commission.*

FEBRUARY 1945.

## APPENDIX

The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220-221 (substantially embodied in 28 U. S. C. 44, 47, 47a; *infra*, pp. 51-54) provides in part:

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear

and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, on whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken

within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. \* \* \*

Section 44 of Title 28, U. S. C. provides:

The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States.



Section 47 of Title 28, U. S. C. provides:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based

upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 47a of Title 28, U. S. C. (Section 210 of the Judicial Code) provides:

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the

notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

Section 345 of Title 28, U. S. C. (Section 238 of the Judicial Code) provides:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. [Section 1 of the Act of February 13, 1925, 43 Stat. 936, 938.]

Part II of the Interstate Commerce Act, as amended.

Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(49 U. S. C. 303 (a) (14).)

Section 206 (a) provides:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 21, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so oper-

ated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained



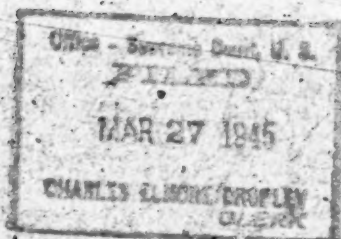
such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part. (49 U. S. C. 306 (a).)

Section 208 (a) provides:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (49 U. S. C. 308 (a).)



FILE COPY



No. 448

---

*In the Supreme Court of the United States*

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE UNITED STATES AND THE  
INTERSTATE COMMERCE COMMISSION

---



# In the Supreme Court of the United States

OCTOBER TERM, 1944

N<sup>o.</sup> 448

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

v.

HANGOCK TRUCK LINES, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF INDIANA

## REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

We wish to comment briefly upon certain contentions in appellee's brief: We believe that these contentions are irrelevant.

1. In its "Corrected Statement of the Case" (Br. 2-11),<sup>1</sup> appellee recites at length the history

<sup>1</sup> Appellee states (Br. 2) that "such corrected statement" is "taken largely from the findings of fact, found in the Record between pages 65 and 73." The "findings of fact" there referred to are not findings of fact made by the Commission, but are those prepared by appellee and signed by the court below. Appellants assigned as error the making of those findings and the consideration thereof by the district court as a basis for its decree (Assignment of Errors Nos. 3 and 8, R. 75, 76).



and characteristics of appellee's motor-carrier operations other than those derived from its acquisition of its predecessor, Globe; the circumstances described by Division 4 of the Commission in its report made in connection with its order of May 16, 1942, approving the purchase of Globe by appellee (38 M. C. C. 382; R. 99, 104); and the steps taken by appellee to expand and alter, since its acquisition of Globe, the operations acquired from Globe. Appellee complains (Br. 8, 45) that if the Commission's order of August 4, 1943 (R. 49-50), is enforced, "all of the business which appellee has built up under said unification order of May 16, 1942, will be destroyed, and appellee will be put back to the position which Globe was in when said order was entered." We submit that the position which Globe was in during the "grandfather" period is precisely the position in which appellee should be placed. An applicant under the "grandfather" clause (sec. 206 (a)) is entitled only to authority to continue the operations which were conducted *bona fide* on and since June 1, 1935. That provision of the statute does not permit an applicant to improve his position in the transportation system by enlarging the scope of his business beyond that existing on the "grandfather" date.

Appellee is not entitled to any greater rights than Globe would have been entitled to if the sale to appellee had never taken place. The

order of Division 4 of the Commission on May 16, 1942, in the acquisition proceeding (38 M. C. C. 382, R. 99) merely authorized transfer to appellee Hancock of whatever rights Globe might ultimately be entitled to upon the outcome of the proceedings dealing with its "grandfather" clause application. The report of Division 4 in the acquisition proceeding expressly states (R. 104) that: "Hancock \* \* \* will be entitled to a certificate covering any 'grandfather' common-carrier rights which may be confirmed as a result of those applications."<sup>2</sup> The order issued pursuant to that report specifically stated in its concluding paragraph (R. 105) "That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein." By virtue of this order appellee obtained only such rights as might ultimately be granted as a result of the "grandfather" clause proceedings.

Appellee purchased Globe with full knowledge that Globe's "grandfather" application was still pending and undetermined. Appellee, as successor in interest to Globe, took Globe's interest subject to the contingency of a possible unfavor-

<sup>2</sup> In accordance with the Commission's usual policy of preventing duplications, a further provision was added by Division 4 which had the effect of limiting its approval of the transfer of Globe's ultimate "grandfather" rights to those which would not duplicate other operating rights held by Hancock (R. 104).

able decision by the Commisison on the "grandfather" claim.<sup>3</sup> Appellee's claim is analogous to a statement by a purchaser of land subject to litigation, that he ought to be allowed to hold the land even after an adjudication that his grantor's title was defective.

Clearly no consideration can be given in this case to appellee's contentions regarding the business it has built up since its acquisition of Globe and regarding the volume of traffic obtained from shippers other than freight forwarders which appellee, since its purchase of these routes from Globe, has transported over some of these routes. Such subsequent operations by appellee could not increase Globe's rights under the "grandfather" clause, and it is only those rights that appellee may assert here as successor in interest to Globe. Only in a proceeding involving the issue of "public convenience and necessity" under Section 207 would the considerations which appellee seeks to urge become pertinent. Appellee is free to file an application under Section 207 if it wishes to obtain, upon grounds of public convenience and necessity, the right to transport traffic of a type which Globe did not handle during the "grandfather" period.

---

<sup>3</sup> For example, if Globe's application had been denied because of interruption of service (cf. *Gregg Cartage Co. v. United States*, 316 U. S. 74), it cannot be supposed that appellee would, nevertheless, be entitled to a certificate.

The order of Division 4 (38 M. C. C. 382; R. 99, 104) is of no pertinence in this case, except as showing appellee's standing to sue as successor in interest to Globe. That order was made in proceedings under Section 5 of the Interstate Commerce Act, which requires approval by the Commission for transactions where one carrier obtains control of another.<sup>1</sup> We do not question appellee's right to whatever operating authority Globe might ultimately obtain in the "grandfather" clause proceeding. The question in the case at bar is as to the proper scope of such authority.

2. In determining what authority appellee is entitled to under the "grandfather" clause the Commission did not in any manner affect the order made by Division 4 on May 16, 1942, authorizing appellee to become successor in interest to Globe (38 M. C. C. 382; R. 99, 104). It is incorrect to assert, as appellee does (Br. 37), that by the

<sup>1</sup> An order under Section 5 is purely permissive. Appellee was not obliged by the order of Division 4 to consummate the transaction for which approval was given therein, or compelled by virtue of that order to pay the purchase price of \$9,900 to Globe, as argued in appellee's brief (Br. 36). Moreover, it should be noted that the proceedings before Division 4 were practically *ex parte*. No protestants appeared (R. 99). The recitals made by Division 4, which appellee sets forth at length (Br. 29-34), were thus based entirely upon the evidence submitted by the vendor and vendee themselves, both of which were controlled by a single family (R. 100).

Commission's order involved in the case at bar the order of Division 4 made on May 16, 1942, is "set aside, or its virility nullified." In fact, appellee elsewhere seems to recognize that "a hearing and decision under Section 5 can not be confounded and intermingled with a hearing on an application under Section 206" (Br. 36).

Appellée was deprived of nothing given by the order of Division 4 of May 16, 1942, even if the unsound assumption be indulged *arguendo* that the purchase proceedings order of Division 4 (38 M. C. C. 382; R. 99) "is a vested property right of appellee" which "confers contractual rights" such as those derived from a policy of war risk insurance (Br. 40). No question of constitutional right under the Fifth Amendment is involved.<sup>5</sup> Other than the jurisdictional question, the only question is the lawfulness of the Commission's exercise of its powers under the Interstate Commerce Act. Obviously if the order complained of is a valid exercise of regulatory power under the Interstate Commerce Act, appellee is subjected to no deprivation of property without the due process of law. *Baltimore & Ohio Railroad Co. v. United States*, 305 U. S. 507; 526; *Visceglia v. United States*, 24 F. Supp. 355, 359 (S. D. N. Y.); *Transamerican Freight Lines*

<sup>5</sup> Compare the clearly erroneous conclusions contained in the district court's findings of fact Nos. 2 and 19 (R. 66, 73) see Assignment of Errors Nos. 3, 9, and 17 (R. 75-77).



v. *United States*, 51 F. Supp. 405, 410 (D. Del.); cf. Section 207 (b) of the Interstate Commerce Act (49 U. S. C. 307 (b)).

3. It is difficult to comprehend the pertinence of appellee's reference (Br. 15, 43) to Sections 216 (a) and 216 (d) of the Interstate Commerce Act (49 U. S. C. 316 (a) and 316 (d)).

The first of these provisions relates solely to passenger carriers, and makes it their duty to provide safe and adequate service, and to establish reasonable fares and practices relating to the issuance of tickets and the carrying of baggage. This provision of the statute is not applicable to appellee at all, since appellee is solely a carrier of property. Section 216 (b) contains similar provisions applicable to carriers of property, but no issue as to any matter covered by this provision is involved in the instant case.

Likewise, no issue arises here under Section 216 (d), which prohibits unreasonable and discriminatory rates. The fact that appellee in its motor-carrier operations has complied with applicable regulations as to safety, equipment, packing, and marking property, and filing tariffs is not a circumstance bearing upon the scope of its rights under the "grandfather" clause. These matters might instead be evidence as to the "fitness" of the carrier in a non-"grandfather" proceeding under Section 207 of the Act.

The mere fact that appellee is a common carrier and as such under a duty to serve the public does not authorize it to furnish service in excess of its operating authority as granted by the Commission pursuant to the regulatory statute. As a daily routine the Commission conducts investigations with a view to prosecuting common carriers which contravene the territorial and commodity limitations of their certificates. It has never been supposed that merely because a carrier is a common carrier it is entitled to serve all localities or to transport all commodities without regard to the scope of its operating authority.

4. Appellee asserts that its abandonment of the issue as to commodity restrictions in its petition for reconsideration before the Commission was not a voluntary waiver (Br. 50-54; cf. R. 129-130). It seems to view its action before the Commission in renouncing its claim in that respect as merely a proposition offered in a bargaining process. It seems unnecessary to state that a proceeding before the Commission is not a negotiation leading to a contract with the applicant, but is a quasi-judicial exercise of public authority. Having complete freedom to decide what position it should take in its capacity as a party to such a proceeding, appellee cannot be heard to say that its decision as to the most appropriate and advisable method of presenting its case is not its own voluntary act.

9.  
**CONCLUSION**

For the foregoing reasons, appellants submit that the matters contained in appellee's brief which are discussed herein are not material to the issues involved in this case and may be dismissed from consideration.

CHARLES FAHY,  
*Solicitor General.*

WENDELL BERGE,  
*Assistant Attorney General.*

EDWARD DUMBAULD,  
*Special Assistant to the Attorney General.*

WALTER J. CUMMINGS, Jr.,  
*Attorney.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*

NELSON THOMAS,  
*Attorney,*  
*Interstate Commerce Commission.*

MARCH 1945.



# INDEX

## SUBJECT INDEX

	Page
Statement opposing jurisdiction	1
Appeal not taken in time	3
Appeal not properly taken	3
Statutory provisions	3
Cases denying jurisdiction of Supreme Court where appeal not taken within statutory time allowed	5
Statutory provisions relied on by appellants to not sustain Jurisdiction	6
History of Sections 47 and 47a	8
Commerce Court	8
Commerce Court abolished	10
Section 47a	11
Co-appellant admits that time for appeal expired	13
Motion to dismiss or affirm	14
Exhibit A.—Motion to set aside judgment	15

## TABLE OF CASES CITED

<i>Credit Company, Ltd. v. Arkansas Central Ry. Co.</i> , 128 U. S. 258	5
<i>Old Nick Williams Co. v. United States</i> , 215 U. S. 541	5
<i>The Lucy</i> , 8 Wall. 307	5
<i>Virginian Ry. Co. v. United States</i> , 272 U. S. 658	13





IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

---

Civil Cause No. 795

---

HANCOCK TRUCK LINES, INC.,

*Plaintiff,*

*vs.*

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION,

*Defendants*

---

**APPELLEE'S STATEMENT AGAINST JURISDICTION  
OF SUPREME COURT AND MOTION TO DISMISS  
OR AFFIRM**

---

Comes now Hancock Truck Lines, Inc., appellee, and pursuant to paragraph 3 of Rule 12 of the Supreme Court, files with the clerk possessed of the record of the above cause, the following typewritten statement disclosing matters and grounds making against the jurisdiction of the Supreme Court asserted by the appellants, United States and Interstate Commerce Commission, and includes herewith appellee's motion to dismiss, or, in the alternative, to affirm the judgment of the District Court, such statement and motion being as follows:

### Statement

The judgment of the District Court appealed from herein was entered on May 25, 1944; it was rendered upon the final hearing of the suit brought by appellee against the United States and the Interstate Commerce Commission to suspend and set aside, in part, an order made by said Commission against appellee; on August 4, 1943, the Commission, in a proceeding then properly pending before it, found and adjudged that appellee's predecessor, Globe Cartage Company, Inc., had been engaged in bona fide operations without interruption, since prior to June 1, 1935, transporting by motor vehicles for compensation, in interstate or foreign commerce, general commodities; that it was a common carrier of such commodities, and "entitled to authority to continue operations as such"; the Commission further found that it was without power to restrict or limit the operations of Globe in a manner which would change its status from that of a common carrier; nevertheless, and notwithstanding such findings of fact by the Commission, it ordered that the certificate authorizing operations by Globe as such common carrier of general commodities should be confined to such general commodities "which are at the time moving on bills of lading of freight forwarders"; appellee succeeded to all of the rights of Globe Cartage Company, Inc., and brought this suit to suspend and set aside that part of the order of the Commission which confined its operations as a common carrier of general commodities to such commodities "which are at the time moving on bills of lading of freight forwarders."

The District Court, properly consisting of three judges, in its decree of May 25, 1944, upon the final hearing of said suit, and upon special findings of fact and conclusions of law properly made, signed and entered therein, suspended, set aside and enjoined the enforcement of that part of said

order of the Commission so complained of by appellee; it is from the final hearing of said suit that this appeal has been attempted.

### **Appeal Not Taken in Time**

The petition for this appeal was not filed until July 22, 1944; the appeal was therefore not taken within the time fixed by law; such appeal could only have been taken within thirty days after May 25, 1944; it could not be taken after the expiration of thirty days from May 25, 1944; the Supreme Court therefore has no jurisdiction of this appeal, has no jurisdiction of the parties, or of the subject matter of the appeal, and it can not acquire any jurisdiction herein.

### **Appeal Not Properly Taken**

The judgment from which the appeal has been attempted was rendered by a statutory three judge court, which can only act by a majority of its members, and the appeal has been acted upon by only one judge of said court.

### **Statutory Provisions.**

The statutory provisions upon which appellee relies to sustain its position that the Supreme Court has no jurisdiction of this appeal are found in Section 47, Title 28, U. S. C. A. (Act of Oct. 22, 1913, c. 32, 38th Stat. 220), which provides as follows:

“No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of

whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at last five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part,



*any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."* (Emphasis supplied.)

Appellee contends that the foregoing statute limits the right of appeal in suits brought to suspend and set aside, in whole or in part, an order of the commission, to thirty days from the final hearing, and a petition for such appeal can not be granted by less than a majority of the three judge court referred to therein. The provisions of Section 792, Title 28, U. S. C. A. do not relate to proceedings after final judgment, as such Act clearly shows that it only authorizes action by a single judge which may be reviewed by all of the judges prior to the final hearing.

#### **Cases Denying Jurisdiction of Supreme Court Where Appeal Not Taken Within Statutory Time Allowed.**

Where the statutory time for taking an appeal has expired, it cannot be arrested or called back by an order of the court allowing such appeal; the court has no power to allow an appeal after the time limited therefor has expired; the Supreme Court cannot exercise jurisdiction in an appeal that was not taken within the time prescribed by the statute, as its appellate jurisdiction depends upon the Acts of Congress.

*Credit Company Limited v. Arkansas Central Railway Company* (1888), 128 U. S. 258;

*Old Nick Williams Co. v. United States* (1910), 215 U. S. 541;

*The Lucy* (1868), 8 Wall, 307.

## Statutory Provisions Relied On by Appellants Do Not Sustain Jurisdiction.

Appellants, in their jurisdictional statement, under the title "*A. Statutory Provisions,*" rely upon;

"U. S. C., Title 28, Section 47a (Act of March 3, 1941, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of Oct. 22, 1913; c. 32, 38 Stat. 220)."

Said *Section 47a, Title 28 U. S. C. A.* is the only authority cited by appellants bearing upon the question of the time in which the appeal must be taken; their other citations relate to the right of the District Court, and the Supreme Court in a proper appeal, to exercise jurisdiction of the cause of action presented by the complaint.

*Section 47a, Title 28 U. S. C. A., upon which appellants predicate the jurisdiction for this appeal, was repealed by the Act of Congress of February 13, 1925, c. 229, Section 1, 43 Stat. 938, such Act being as follows:*

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and *not otherwise.* (Emphasis supplied.)

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money" includes only cases referred to in Section 47).

"Sec. 13. That the following statutes and parts of statutes be, and they are, repealed;

All other Acts and parts of acts, insofar as they are embraced within and superseded by this Act as are inconsistent therewith" (43 Stat. 940).

Said Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, is Section 345, Title 28 U. S. C. A., and the annotators have set it up therein as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:—

(4) So much of Section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

There is no justification for the re-write of section 345, Title 28, U. S. C. A., which the annotators have included as section 345 in the 1943 Supplement to the Code, and wherein they have supplied the reference to section 47a; the original Act of Congress, 43 Stat. 938, must stand, and the appeals referred to in Section 47a are prohibited by said act of February 13, 1925; the right to such appeals having been abolished, the time fixed for taking such appeals becomes *functus officio*.

From 1925 to 1934, section 47a did not appear in the Code; the fact that it has been improperly resurrected and permitted to linger in the successive editions of the Code is immaterial; the Code cannot prevail over the Statutes at Large where the two are inconsistent, and such inconsistency exists both as to section 47a and section 345 as

carried in the 1943 Supplement; *Stephan v. United States* (1943), 319 U. S. 423.

Our position in this regard will more fully appear from a further examination of the history of Sections 47 and 47a.

### History of Sections 47 and 47a.

Sections 47 and 47a, as printed in Title 28, U. S. C. A., originated from two sources:

- a. Section 47 is an amendment of certain provisions of the law which created the Commerce Court (created June 28, 1910, c. 309, Sec. 36, Stat. 539; 36 Stat. 1146-1150; 38 Stat. 219).
- b. 47a sets out language taken from Stat. 36, 1150 and from 38 Stat. 220, which was recast by the annotators of the United States Code to express their conception of existing law; it was repealed by the Act of Feb. 13, 1925, c. 229, Sec. 1; 43 Stat. 938 (Sec. 345, Title 28 U. S. C. A.).

### Commerce Court.

The Commerce Court Act was formerly Chapter 9 of the Judicial Code and consisted of sections 200 to 214. We do not believe it is proper to set out the whole of such Act, but do feel that it is advisable to make the following references thereto; the Act creating such court is very largely set out following subdivision (27) of section 41, Title 28, U. S. C. A., on pages 648-651 of the volume containing said subdivision (27).

Section 207 gave the court its jurisdiction, which, for the purpose of this statement, may be set out as follows:

First: All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money (now subd. 27 of Section 41).

Second: Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission (now subd. 28 of Section 41).

Third: (Related to unjust discrimination; see Title 49, U. S. C. A. Section 43.)

Fourth: (Related to mandamus proceedings; see Section 20(e) of Title 49, U. S. C. A.)

*Section 208* is section 46 of Title 28 U. S. C. A. and provides that suits to enjoin, set aside, annul or suspend any order of the Interstate Commission shall be brought in the (district) court against the United States.

*Section 209* is section 45 of Title 28 U. S. C. A. and relates to the invoking of jurisdiction by filing a petition and the giving of thirty days' notice.

*Section 210* is set out in full, because it related to appeals and fixed the time within which such appeals might be taken; it is as follows:

"A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transferred on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the



United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeal to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court."

(36 Stat. 1146-1150.)

It should be noted that in the Commerce Court Act an appeal might be taken from a final judgment within sixty days, and from an interlocutory order or decree within thirty days.

### **Commerce Court Abolished.**

The Commerce Court was abolished and its jurisdiction was transferred to the District Courts by provisions of the Deficiencies Appropriations Act of October 22, 1913, c. 32, 38 Stat. 219; this transfer of jurisdiction carried over to the district courts the jurisdiction of the Commerce Court in the specific cases referred to hereinabove as being within the jurisdiction of such court, and such specific cases became, and are now, those referred to and included within clauses 27 and 28 of Title 41, U. S. C. A.,—27 being, "all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money"; and 28 being, "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission"; also the cases referred to in Section 43 and Section 20 (e), Title 49 U. S. C. A.

When Congress abolished the Commerce Court, it nevertheless preserved the principle that where cases were brought to enjoin, set aside, annul or suspend in whole

or, in part any order of the Interstate Commerce Commission, more than one judge should sit, and provided that a three judge court must be convened, and that one member thereof must be a circuit court judge; it required a majority of three judges to concur in any action taken by the court; it also preserved the principle of expediency in such cases, and clearly differentiated between the procedure in ordinary cases arising under clause 27, supra, and those arising under sections 43 and 20(e) of Title 49, as against cases arising under clause 28, and set up a special procedure as to cases arising under clause 28, not only as to the hearing before the lower court, but also as to when the appeal must be taken in such special cases, *and expressly limited the time for taking appeals from final judgments in such cases to thirty days* (Section 47, Title 28, U. S. C. A.).

#### Section 47a.

Immediately following that part of the original Act of October 22, 1913, c. 32, 38 Stat. 220, which we have set out on page 4 as Section 47 of Title 28, U. S. C. A., is found that part of such Act which is relied upon by appellants as conferring jurisdiction of this appeal, and it is as follows:

“A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice shall be served upon the defendants in the case and upon the attorney General of the State.”

Section 47 and that part of 47a just quoted are parts of a single section of the Act of October 22, 1913, c. 32, 38

Stat. 220 aforesaid, which was an Act that abolished the Commerce Court, transferred its jurisdiction to the District Courts, and appeals were provided direct to the Supreme Court in all cases, and that part of the original Act of October 22, 1913, relating to appeals from the District Courts, and which the annotators of the federal code have divided in sections 47 and 47a, reads as follows:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

We submit that said part of said act which is carried as section 47 relates to appeals from cases arising under subdivision (28) of Section 41, Title 28 U. S. C. A., which have been determined by the three judge court aforesaid, in cases brought to enjoin, set aside, annul, or suspend, in whole or in part, an order of the Commission; the part which is carried as 47a was, when enacted, intended to have application to all cases heard and determined by a single judge sitting as a district court, but since the Act of February 13, 1925, 43 Stat. 938, *supra*, the time for appeal referred to in section 47a has no application, because such cases cannot be taken direct to the Supreme Court.

The Supreme Court has already recognized that the time for appeal formerly allowed by the Commerce Court Act has been shortened from sixty to thirty days by the Act of October 22, 1913; see *Virginian Ry. Co. v. United States*, (1926), 272 U. S. 658, where, in speaking of said Act, it says:

"Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of the writs of injunction in cases of this character by the provisions which require action by the court of three judges, which permit of expediting hearings before the District Court, *which shorten the period of appeal* (emphasis supplied), and which give a direct appeal to this court."

The only time which was shortened by the Act of October 22, 1913, was the reduction of the time for appeal from final hearings *from sixty to thirty days*.

#### **Co-Appellant Admits That Time for Appeal Expired.**

The co-appellant, or the appellant in a separate appeal from the same judgment, viz. Regular Common Carrier Conference of the American Trucking Associations, Inc. has heretofore admitted that the time for this appeal had expired before the petition for such appeal was filed; it was not a party to the suit as originally filed by appellee, but it came in with a petition to intervene, and on April 8, 1944, the lower court gave it the right to intervene; as above stated, the judgment was rendered on May 25, 1944; on July 5, 1944, it directed a letter, which had attached thereto a motion, to each of the judges who heard and decided the case below, with copy served on counsel for appellee, wherein it moved the three judge court to set aside said judgment of May 25, 1944, and reenter it as of a later date, the reason assigned being that it had not been noti-

ed of the rendition of the judgment until June 30, 1944, and the time for taking an appeal from such judgment had then elapsed (emphasis supplied.) (See copy of such motion attached hereto and marked Exhibit A).

We thus have the written admission of one of our adversaries that our position is correct, and the appeal has not been timely taken.

Inasmuch as the Supreme Court cannot acquire any jurisdiction of this appeal, the appeal should be dismissed, or the judgment should be affirmed.

**Motion for Dismissal or for Affirmance of Judgment.**

The appellee, Hancock Truck Lines, Inc. now moves the Supreme Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the District Court, for the reason that the Supreme Court has no jurisdiction of this appeal, and cannot acquire any jurisdiction herein.

Dated at Indianapolis, Indiana, this 2nd day of August, 1944.

HANCOCK TRUCK LINES, INC.,

By JACOB WEISS,

8 East Market St., No. 512.

ALBERT WARD,

8 East Market St., No. 318.

FERDINAND BORN,

718 Chamber of Commerce Bldg.

all of Indianapolis, Indiana,

Its Attorneys.



**EXHIBIT "A":****IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION.**

Civil Action

File No. 795.

**HANCOCK TRUCK LINES, Inc., Plaintiff,**

vs.

**UNITED STATES AND INTERSTATE COMMERCE COMMISSION,  
Defendants.****Motion to Set Aside Judgment.**

Comes now the Regular Common Carrier Conference of the American Trucking Associations, Inc., and by its attorneys respectfully shows the Court that:

(1) The said Regular Common Carrier Conference of the American Trucking Associations, Inc., was granted the right to intervene in the above cause by this Court;

(2) That the said intervenor appeared by its counsel in said cause, participated in the hearing of said cause and filed briefs herein;

(3) That the said intervenor was duly notified by mail by the Clerk of this Court of the dates on which hearings would be held;

(4) That the said intervenor and its attorneys, being unfamiliar with the Rule of this Court respecting the appointment of counsel resident in the County wherein the judge of this Court is holding Court (Section (d), Rule 1 of the Rules of the District Court of the United States for the Southern District of Indiana) and relying upon the practice heretofore followed in the case of *Ziffrin, Inc., v. United States and Interstate Commerce Commission*, No. 448 Civil by the Clerk of this Court of mailing notices of

orders and judgments entered, was unaware of the entry of judgment herein on the 25th day of May, 1944, and had no notice of same until the 1st day of July, 1944, when one of its counsel received answer to his inquiry of June 30, 1944 directed to the Clerk of this Court, as per the attached Exhibits A and B, same being copies of the correspondence above referred to.

(5) That the time for taking an appeal from the judgment of this Court had elapsed when notice of judgment was received.

Wherefore, intervenor, by its counsel, respectfully petitions that this Court make and enter its order setting aside its judgment of May 25, 1944, and re-enter same as of July 1, 1944.

REGULAR COMMON CARRIER CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC.,

By \_\_\_\_\_,

1515 Paul Brown Building,

St. Louis 1, Missouri.

HOWELL ELLIS,

520 Illinois Building,

Indianapolis, Indiana.

Resident Counsel.





No. 448

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Appellants,*

v.

HANCOCK TRUCK LINES, INC.,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA,  
INDIANAPOLIS DIVISION

**REPLY BRIEF**

Of Appellee to the Brief of United States and Interstate  
Commerce Commission in Opposition to Appellee's  
Statement Against Jurisdiction and Motion  
to Dismiss or Affirm.

✓ JACOB WEISS,

8 East Market St., No. 512,

✓ ALBERT WARD,

8 East Market St., No. 318,

FERDINAND BORN,

718 Chamber of Commerce  
Building,

all of Indianapolis, Indiana,

*Attorneys for Plaintiff-Appellee.*





IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Appellants,*

*v.*

No. \_\_\_\_\_

HANCOCK TRUCK LINES, INC.,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA,  
INDIANAPOLIS DIVISION

**REPLY BRIEF**

Of Appellee to the Brief of United States and Interstate  
Commerce Commission in Opposition to Appellee's  
Statement Against Jurisdiction and Motion  
to Dismiss or Affirm

Appellee, Hancock Truck Lines, Inc., respectfully asks  
leave to file the following reply to the brief of the United  
States and the Interstate Commerce Commission in opposi-

tion to appellee's statement against jurisdiction, and motion to dismiss or affirm, to stress the following points:

*One*

Section 47, Title 28, U. S. C. A., sets up a complete procedure before a three Judge Court where the relief sought involves restraining, enjoining or suspending an order, in whole or in part, of the Interstate Commerce Commission; it very clearly provides for, as appellants admit, an appeal direct to the Supreme Court from an order granting or denying an interlocutory injunction, "if such appeal be taken within thirty days after the order" is made; immediately thereafter follows the provision of the statute for an appeal upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission and specifies that the same requirement as to Judges and the same procedure as to expedition and appeal shall apply.

We think the language of this Act, and the intent of Congress, are clear, and it is very definitely provided that such appeal from a final decision of a three Judge Court must be taken within thirty days from the date of the final judgment; to give the statute the meaning contended for by appellants is to wholly disregard, and read out of the statute, that part thereof which provides that "the same procedure as to expedition" shall apply: these words are in the statute and should be given their plain and ordinary meaning, which is that an appeal from a final judgment in such cases must be taken within the same time as appeals from interlocutory orders. If the contention of appellants is to prevail, then there are two statutory provisions relating to such appeals from final judgments, one,

under 47, providing that the appeal must be taken within thirty days, and two, under 47-a, where the appeal may be taken within sixty days; these statutes deserve no such incongruous construction; Section 47 provides the time for appeal in this case.

On page 10 of appellants' brief they refer to the case we cited of *Virginian Ry. v. United States*, 272 U. S. 658, 672, and say:

"It appears, however, that all that the Court meant was that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time."

We do not think this is a correct application of the language used by the Court in the *Virginian* case; the Court was comparing the Urgent Deficiencies Act with Section 266 of the Judicial Code, which regulates proceedings before a three Judge Court in applications to enjoin or restrain the enforcement of state statutes; the Court said the two statutes were in *pari materia*, and that the two provisions originated in the same Act; it then further used the language set out on Page 11 of our jurisdictional statement; there can be no contention that the Court had in mind the ninety day statute for appeals when it said that Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of writs of injunction in cases of this character by the provisions which require action by three Judges, which permit of expediting hearings, and which shorten the period of appeal.

## Two

On pages 8 and 9 of Appellants' brief it is argued that if appellee's contentions are correct, a very large proportion of the suits to set aside orders of the Commission have been improperly granted and numerous decisions of this Court have been made in appeals over which the Court had no jurisdiction. We submit that this is not a proper argument, nor a sufficient reason, for denying jurisdiction in this case. With proper respect, we feel that this Court should not take jurisdiction of this case simply because it has decided other cases of a similar nature where lack of jurisdiction was not properly brought to the Court's attention; while the Court has the right to, and does, examine the record to see whether it has jurisdiction, yet a subsequent litigant who presents a jurisdictional question should not be bound by former decisions involving similar cases where the jurisdictional question was neither presented nor fully argued.

Appellee has presented this question in the manner provided for by the rules of this Court, and is urging that this appeal is predicated upon a statute that has been repealed and has no application whatever herein.

## Three.

On page 9 of appellants' brief, they assert that the contention which we present herein was made in the case of *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.*, 319 U. S. 551; insofar as we are able to determine, there was no jurisdictional statement filed by the appellee in that case as required by Rule 12; a motion to dismiss or affirm was filed, which raised the question that the appeal had not been taken within thirty days; it did not



present the question that Section 47-a had been repealed; and if our position is correct, this Court has no power to consider this appeal on its merits, and appellee's motion to dismiss, or, in the alternative, to affirm, should be sustained.

### *Fair*

On page 11 of appellants' brief it is argued that Section 47 does not require that the petition for an appeal should be granted by a majority of the three Judge Court; we think it does so provide when it says that upon the final hearing the same requirement as to Judges and the same procedure as to expedition and appeal shall apply; this means that on the appeal a majority of the Judges must concur; they cannot act in any other manner; the requirement of a three Judge Court is not a mere privilege or right which the parties may waive; it is a jurisdictional requirement (*Riss & Co. v. Hoch et al.* (1938), 99 Fed. (2) 553 (10 C. C. A.)); the power and duties of such court do not terminate upon the rendition of a final judgment; when once properly created and assembled, the case "shall be heard and determined by three Judges"; this does not mean that one Judge can take over and act upon matters occurring subsequent to final judgment; the granting of an appeal, fixing bond, determining whether injunctive relief shall be granted pending the appeal, are not purely ministerial matters; they are matters involving a sound judicial discretion; it is a question of statutory power and jurisdiction; we do not understand that Rule 36 relates to appeals from a three Judge Court, as that Rule seems to relate to appeals from a District Court where a single Judge has the power to hear the case below, and to grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal; these

are matters which could certainly not be done by one member of a three-Judge Court; especially is this true in this appeal, where it is earnestly contended that the time for the appeal had expired before the petition had been presented; the three Judges should have passed on this question. We pointed out in our original statement that section 3 of the Act of April 6, 1942, 28 U. S. Supp. III, 792, clearly related to such acts as might be reviewed by the three Judges at the final hearing, and of course this would not authorize one Judge to act alone on matters arising after final judgment. Appellants again urge on pages 12 and 13 of their brief that because other cases have been considered by the Court where the appeal was granted by a single Judge, therefore this one should also be decided; we think this argument begs the question and evades the issue; if the matter is jurisdictional, former decisions in similar cases cannot confer jurisdiction in this one.

We do not believe that either of these questions has been decided by this Court; we have presented them in the manner provided by the Rules of the Court; they affect the substantial rights of appellee, and we urge that the motion to dismiss, or, in the alternative, to affirm, should be sustained.

Respectfully submitted,

JACOB WEISS,

8 East Market St., No. 512,

ALBERT WARD,

8 East Market St., No. 318,

FERDINAND BORN,

718 Chamber of Commerce  
Building,

all of Indianapolis, Indiana,

*Attorneys for Plaintiff Appellee.*





FILE COPY

No. 448

Office - Supreme Court, U. S.  
FILED

MAR 15 1945

CHARLES ELMORE ORRLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,  
*Appellants.*

v.

HANCOCK TRUCK LINES, INC.,  
*Appellee.*

ON APPEAL FROM A THREE-JUDGE COURT OF THE  
UNITED STATES, FOR THE SOUTHERN DISTRICT  
OF INDIANA

## BRIEF FOR APPELLEE

JACOB WEISS,  
8 East Market St., No. 512,

ALBERT WARD,  
8 East Market St., No. 318,

FERDINAND BORN,  
718 Chamber of Commerce Bldg.,  
All of Indianapolis, Indiana,  
*Attorneys for Appellee.*





## INDEX

	Page
Jurisdiction .....	1
Corrected Statement of Case.....	2-11
Specification of Errors Intended to be Urged.....	11-12
Summary of Argument.....	12-17
Argument on Jurisdiction.....	18
Granting Appeal by Single Judge.....	18-22
Granting Appeal after Time Expired.....	22-25
Former Decisions of This Court.....	26-27
Argument on Merits.....	28
Question Actually Presented.....	28
Order of May 16, 1942.....	29-34
Estoppel against Commission.....	35-36
Part of Commission's Order Complained of Violates Fifth Amendment .....	36-40
Part of Commission's Order Complained of Violates Section 206 (a).....	41-42
Part of Commission's Order Complained of Violates Section 216 (d).....	43
Void Part of Commission's Order Complained of is Capricious.....	44
Void Part of Commission's Order Complained of is Unreasonable .....	45-46

	Page
Judgment of District Court is not Violative of Commission's Administrative Functions.....	46-47
Remand is not Proper Remedy.....	47-50
Exhausting Administrative Remedies.....	50
Waiver .....	50-54
Commission did not find that Appellee was not holding itself out to transport for all shippers.....	54-56
Inconsistency of Commission's Decisions.....	56
Substantial Parity .....	56-59
Conclusion .....	59

## CITATIONS

	Page
Bartemeyer v. Iowa, 14 Wall, 26.....	22
Bowerman v. Detroit Free Press, 287 Mich. 443.....	54
City of Ironton v. Harrison Const. Co., 212 Fed. 353.....	52
Credit Co. v. Ark. Central Railway, 128 U. S. 258.....	21
Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com., 260 U. S. 212.....	21
Covington Stock Yards Co. v. Keith, 139 U. S. 128.....	58
Ex Parte Metropolitan Water Co., 220 U. S. 539.....	18
Interstate Commerce Commission v. Columbus & Greenville Ry. Co., 319 U. S. 551.....	26
Hasler v. West India, 212 Fed. 862.....	52
Hodges v. Easton, 106 U. S. 408.....	16-51
Hunter Milling Co. v. Koch, 82 Fed. (2) 735.....	52
John T. New v. Territory of Oklahoma, 195 U. S. 252	27
KVOS Inc. v. Associated Press, 299 U. S. 269.....	27
Lynch v. United States, 292 U. S. 571.....	40
McClellan Trucking Co., 321 U. S. 67.....	38
New State Ice Co. v. Liebman, 285 U. S. 262.....	58
Seaboard Air Line Ry. v. Watson, 287 U. S. 36.....	12-16
Smith v. Wilson, 273 U. S. 388.....	24
State of Iowa v. Carr, 191 Fed. 257.....	35
Town of St. John v. Gerlach, 197 Ind. 289.....	52
United States v. Carolina Freight Carriers, 315 U. S. 475 .....	55
United States v. Maher, 307 U. S. 148.....	42

	Page
United States v. Shingle, 91 Fed. (2) 85, cert. denied, 302 U. S. 746.....	11
United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311.....	47
United States v. John-II Estate, 91 Fed. (2) 93, cert. denied, 302 U. S. 746.....	12
United States v. Stinson, 197 U. S. 200.....	35
United States v. Denver, 16 Fed. (2) 374.....	35
Victor Products Corp. v. Yates, 54 Fed. (2) 1062.....	52
Walker v. United States, 139 Fed. 409.....	35
Webster v. Fall, Sec. of Interior, 266 U. S. 507.....	27
Interstate Commerce Act	
Section 5 (2) (9), Part I, Section 5, Title 49 U. S. C. A. ....	13-37
Section 203 (14), Part II, Section 303, Title 49 U. S. C. A. ....	55
Section 206, Part II, 306 Title 49 U. S. C. A. 2-10-14-15-28-40-41-42-47-58	
Section 208, Part II, 308 Title 49 U. S. C. A. ....	15-58
Section 216 (a) (d), Part II, 316 Title 49 U. S. C. A. 15-43-51-58	
Fifth Amendment to the Constitution.....	14-15-16-38-40
Rules of This Court	
Rule 12 (3).....	18
Rule 13 (9).....	12
Rule 27 (2).....	11
Rule 27 (7).....	12
Rule 36.....	22
Rule 38 (2).....	11



	Page
Rule 52 Federal Rules of Civil Procedure.....	2
Rule 72 Federal Rules of Civil Procedure.....	22
Miscellaneous	
Urgent Deficiencies Act, Oct. 22, 1913, Sec. 47,	
Title 28 U. S. C. A.....	2-12-18-23
Section 47-a, Title 28 U. S. C. A.....	18-23-24
Act of April 6, 1942, 56 Stat. 199.....	19
Act of Feb. 13, 1925, 43 Stat. 936.....	24
Judicial Code	
Section 266 .....	18-21-24
R. C. L. Vol. 27, Sec. 5, P. 908.....	52



No. 448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

---

THE UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,  
*Appellants,*

HANCOCK TRUCK LINES, INC.,  
*Appellee.*

---

ON APPEAL FROM A THREE-JUDGE COURT OF THE  
UNITED STATES, FOR THE SOUTHERN DISTRICT  
OF INDIANA

---

## BRIEF FOR APPELLEE

---

### JURISDICTION

Appellee filed its verified complaint in the Indianapolis Division of the District Court of the United States for the Southern District of Indiana, on March 29, 1944, to set aside, in part, an order made by the Interstate Commerce Commission; Judge Baltzell, the District Judge, immediately called to his assistance to hear and determine the application two other Judges; the trial court, when assembled, consisted of Honorable Sherman Minton, of the Seventh Circuit Court of Appeals, Honorable Luther M.

Swygert, of the Northern District of Indiana, and Honorable Robert C. Baltzell, of the Southern District of Indiana (R. 53); the Court acted with expediency; the evidence was heard on April 8 (R. 89); the case was orally argued on April 28 (R. 65); findings of fact and conclusions of law, pursuant to Rule 52 of the Rules of Civil Procedure, were signed and filed on May 25, 1944 (R. 65), and the final decree was entered on May 25, 1944 (R. 74). The petition for appeal was not filed until July 22, 1944.

The jurisdiction of this court is denied by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, Section 47, Title 28 U. S. C. A. Under such Act, the appeal had to be taken within 30 days after May 25, 1944, and the appeal had to be presented to, and acted upon, by the statutory three judge court which tried the cause.

These questions are presented by appellee's Statement Opposing Jurisdiction of this Court, filed on August 2, 1944, and which has been separately bound as a part of the record in this appeal (Statement 3).

### **CORRECTED STATEMENT OF THE CASE**

The failure of appellants to make a concise statement containing all that is material to the consideration of the questions presented, will necessitate the making of a corrected statement by appellee, and such corrected statement, taken largely from the findings of fact, found in the Record between pages 65 and 73, is as follows:

On or about the 29th day of January, 1936, Globe Cartage Company, Inc., filed its written application with the Commission under the grandfather clause of Section 206, Part II of the Interstate Commerce Act, Section 306, Title

49 U. S. C. A., duly alleging that it was in fact in bona fide operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which such application was made by it, and had so operated since that time down to the filing of its application; such application was numbered MC-3339, was designated as application of Globe Cartage Company, Inc., Common Carrier Application, and after the rights of Globe were taken over by appellee as hereinafter shown, it was designated by the Commission as No. MC-25567 (Sub. No. 8), Hancock Truck Lines, Inc., successor to Globe Cartage Company, Inc.; therein it requested the Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by it to the Commission in all respects as provided for in Paragraph (b) of Section 206, of Part II of the Interstate Commerce Act aforesaid, and within 120 days after October 1, 1935 (R: 66-67).

While said application of Globe Cartage Company, Inc., was thus pending before the Commission, the Hancock Truck Lines, Inc., and said Globe Cartage Company, Inc., filed and presented to the Commission their joint application asking an authorization for the purchase by the Hancock Truck Lines, Inc., of all of the common carrier operating rights of Globe which were involved in said application; a hearing was had and a finding and order were made by the Commission on May 16, 1942, authorizing such purchase; when said joint application was first filed, Hancock had only paid Globe \$100 on the purchase price, but had agreed to pay an additional \$2,500 upon approval of such transaction by the Commission, \$2,500 upon final approval by the last concerned State regulatory authorities, and \$4,900 within ten days thereafter; as a justification for



such authorization order, the Commission found that approximately 65% of Globe's traffic consisted of business handled for Universal Carloading and Distributing Company, a freight forwarding company, and as a result of handling such business the flow of traffic for Globe was unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it found, on the other hand, that Hancock enjoyed heavier traffic east out of St. Louis than in the reverse direction; the Commission found that, with some exceptions not material herein, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive; both carriers were found to be serving Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points; Globe did not believe that it would be justified in expending additional funds to develop a better balanced operation, and, as its functions and facilities substantially duplicated those of Hancock, the desired result could be accomplished through the unification of the operations in Hancock; the Commission found that such unification would result in better balanced lading between the common points served, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, and would provide Hancock with shorter routes; Hancock was found to have the necessary organization to conduct the additional operations and it would meet any increased equipment demands either by leasing or purchasing the same; the Commission found that savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the

use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually, approximately \$20,000 of which represented the estimated cost to Globe, if it remained in operation, in developing additional business to balance its present lading; the Commission found that the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation.

The Commission further found that the purchase by Hancock of the common carrier operating rights of Globe, upon the terms and conditions set out in the order, which terms and conditions were found by the Commission to be just and reasonable, was a transaction within the scope of Section 5 (2) (a), Part I of the Interstate Commerce Act, and would be consistent with the public interest, and, pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should conduct the common carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and Hancock would be entitled to a certificate covering any "grandfather" common carrier rights which might be confirmed as a result of those applications, which rights the Commission, by its said order of May 16, 1942, authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; an order was thereupon entered by the Commission conforming to such findings (R. 70-71-72); such order is specifically referred to in paragraphs 13 and 18 of appellee's complaint (R. 5, 8, 9), and the order is set out on pages 99 to 105 of the Record.

Throughout the period of appellee's corporate existence, it has been a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign com-

merce of general commodities; with certain usual exceptions, for compensation, and it has been the holder of certain certificates of public convenience and necessity issued to it by the Commission, different from the certificate and order of the Commission complained of in the complaint (R. 66).

In reliance upon said findings and order of May 16, 1942, the appellee completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as the result of its grandfather applications as aforesaid, with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission, and it thereafter continued to operate under said order of unification up to the time of the trial and to the extent and in the manner as set out in Paragraph 18 of its complaint (R. 72).

Following the findings and order of the Commission of May 16, 1942, appellee, in reliance upon such findings and order, paid to Globe said \$9,900 as the balance of the purchase price for such common carrier operating rights (R. 72).

The proceedings in Cause No. MC-3339 of Globe Cartage Company, Inc., Common Carrier Application, remained pending before the Commission until as of August 4, 1943, on which date the Commission found as a fact that Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e., freight and commodities of every class, type and char-

acter), except commodities in bulk and those of unusual length, height or weight; it further found as a fact that Globe Cartage Company, Inc., was a common carrier by motor vehicle, and further found that the Commission could not, consistently with Globe's common carrier status, restrict its services to particular shippers; the Commission further found as a fact that Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that the Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier (R. 68).

Contrary to such findings of the Commission, it did place restrictions in said order of August 4, 1943, and therein limited the transportation to be performed in the future by appellee to those general commodities which are at the time moving on bills of lading of freight forwarders (R. 68-69).

A petition to modify the effective date of the order was filed, but the order became a final one as of March 31, 1944 (R. 69).

All of the common carrier operating rights of Globe Cartage Company, Inc., in said cause No. MC-3339 were acquired by appellee, under and pursuant to the order of the Commission on May 16, 1942, and appellee is the sole party in interest and will be the sole owner of such certificate as is issued in said proceeding (R. 69).

The appellee, as such common carrier of property by motor vehicles, has, and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and

enforced just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation; the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate and foreign commerce, and has fully complied with all the rules and regulations of the Commission in relation thereto insofar as they are in effect at this time, and as such common carrier it is prohibited by law from making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district, territory, or description of traffic, in any respect whatsoever, and as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates (R. 70).

If that part of the order complained of by the appellee is enforced, all of the business which appellee has built up under said unification order of May 16, 1942, will be destroyed, and appellee will be put back to the position which Globe was in when said order was entered, namely, maintaining duplications in terminals and facilities, handling an unbalanced loading, dead-heading of equipment, its savings in excess of \$50,000 per year through consolidation of overlapping functions, including terminal and pick-up delivery facilities, reduction in truck miles operated, and the use of vehicles operated by transporting heavier loads will all be lost to it, and it will suffer and sustain immediate and irreparable injury, loss and damage on account of the enforcement of the part of said order complained of herein (R. 72).



The Commission made no finding that the restriction complained of by the appellee is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it would be consistent with the public interest and just and reasonable to place such restriction in said order; nor has it found that good cause exists for changing its said order of May 16, 1942 (R. 73); that part of the order complained of by appellee herein is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support; said part of the order is discriminatory against the appellee and is an arbitrary, unreasonable, and capricious restriction upon the rights, duties and privileges of appellee as a common carrier of general commodities by motor vehicle for compensation, and will deprive appellee of its rights and property without due process of law (R. 73).

For convenience, we set out at this point the Commission's order of August 4, 1943, insofar as it affects our question, and have italicized the particular words complained of in this action:

"On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk or those of unusual length, height or weight) *which are at the time moving on bills of lading of freight forwarders*, between the points and in the manner described in the findings in the prior reports" (R. 45).

(The order affects an additional carrier whose application is covered thereby, and who is not involved herein.)

Appellee brought this suit to set aside the italicized part of said order, alleging, in substance, that: inasmuch

as the Commission had found as a fact that appellee was a common carrier of general commodities by motor vehicle as defined by the grandfather clause of the Interstate Commerce Act, it was then the statutory duty of the Commission to issue to it a certificate, "without further proceedings" as expressly provided for by Section 206 (a) which says that

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, \* \* \* the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

That the inclusion of said limitation in said order is an unlawful and illegal restriction against and constraint upon appellee, not authorized by law, and is an unjust, unreasonable, and capricious limitation upon its rights, privileges and duties as a common carrier of general commodities by motor vehicle, and will deprive appellee of its rights and property without due process of law and in violation of the Constitution of the United States and the Fifth Amendment thereto; such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against appellee as a common carrier by motor vehicles, and is contrary to public policy (R. 1-11).

Upon appropriate special findings of fact (R. 63-73), the trial court stated its conclusions of law as follows:

"One. The Court has jurisdiction of the subject matter, and of the parties, in this cause of action.

"Two. That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those which are at the time moving on bills of lading of freight forwarders is illegal and void, and the defendants should be permanently enjoined from enforcing the same" (R. 73).

In conformity with such conclusions, the final decree appealed from herein was entered on May 25, 1944 (R. 74).

#### **SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED**

Without intending to be technical, we feel that we must call attention to the fact that appellants have wholly failed to comply with clause (c), paragraph 2, Rule 27, and paragraph 2, Rule 38, of this Court; no effort has been made to specify in appellants' brief any of the errors intended to be urged; we find no reference in the brief to an assignment of errors, except one, and it relates to the alleged failure of the court to adopt the findings tendered by appellants below; we know of no rule of law which requires a court to adopt all of the findings of fact tendered by a party; counsel cite no authority to sustain this complaint; we think that a mere reading of their proposed findings will clearly demonstrate that they do not cover the questions in this suit, and they should have been rejected; otherwise, we are not able to find a single error, assigned as such, specified in the brief; quite a number of decisions hold that assigned errors which are not specified in appellants' brief should be disregarded; *United States v. Shingle* (1937), 91 F. (2) 85 (9 CCA), cert. denied, 302 U. S. 746;

*United States v. John H. Estate* (1937), 91 F. (2) 93, cert. denied, 302 U. S. 746; *Seaboard Air Line Ry. v. Watson* (1932), 287 U. S. 86; paragraph 6 of Rule 27, expressly provides that

“Errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.”

Their statement of points to be relied upon (R. 144) is too general, no points being set out, and under Rule 13 (9), the court cannot properly consider points thus stated.

Under paragraph 7 of Rule 27, this appeal should be dismissed, as the appellants are clearly in default for failing to specify in their brief such of the assigned errors as are intended to be urged.

If, however, the Court concludes that, at its option, it desires to search the record for an assignment of errors, and then further desires to make its own application of appellants' brief to errors assigned, we assume that it will be proper for appellee to follow the outline in the brief of appellants, which we will now attempt to do.

### SUMMARY OF ARGUMENT

1. This appeal was not taken within the time prescribed by statute: the judgment was rendered on May 25th and the petition for appeal was not filed until July 22, 1944 (R. 74); it had to be taken within 30 days from the date of final judgment: that part of the Urgent Deficiencies Act of October 22, 1913, C 32, 38 Stat. 220, Section 47, Title 28 U. S. C. A., under which this case was tried, and which has direct application to this question, provides as follows:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply" (emphasis supplied).

\*2. A single judge of the statutory three judge court which was assembled to hear and determine this cause could not act upon or grant a petition for an appeal; said Section 47 provides that no injunction shall issue against any order of the Commission,

"Unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges."

3. The Commission, having authorized the unification of appellee's operating rights with those of Globe, by its finding and order of May 16, 1942, could not revoke, change or set aside such unification order without a finding that good cause has been shown for such change; this restriction upon the Commission is found in clause (9) Section 5, Part I of the Interstate Commerce Act, which provides that:



"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate."

And the Fifth Amendment forbids such change, unless appellee has been given notice of the proposed change, a hearing had thereon, and a finding has been made by the Commission that such change is consistent with the public interest, and will be just and reasonable.

The Commission made no finding that good cause existed for changing said order of May 16, 1942 (R. 73).

4. The Commission had neither power nor authority under Section 206(a) of Part II of the Interstate Commerce Act, to limit appellee's operating authority as a common carrier by motor vehicle to transportation of general commodities "which are at the time moving on bills of lading of freight forwarders"; having found, as it did, that appellee's predecessor Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e. freight and commodities of every class, type and character), and that it was a common carrier by motor vehicle (R. 68), the statute expressly provides that in such case

"the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

Section 206, *supra*; Section 306, Title 49 U.S.C.A.

5. The Commission had no power or authority to limit the operations of appellee (a common carrier—not a con-

tract carrier) to the transportation of general commodities moving on bills of lading of freight forwarders, unless it found as a fact that such limitation was reasonable and was required by the public convenience and necessity; Section 208, Part II of Interstate Commerce Act; Section 308, Title 49 U. S. C. A. The Commission did not find that such limitation was reasonable, or required by the public convenience and necessity (R. 73); it could not make such finding under section 206(a), which provides that if the Commission finds the applicant was bona fide engaged as a common carrier, a certificate must be issued "without further proceedings."

6. The Commission found that appellee was a common carrier; the limitation by the Commission of appellee's operations to the transportation of general commodities moving on bills of lading of freight forwarders, is an unlawful restriction of the duties and rights of appellee as a common carrier of such general commodities, and to comply therewith would violate paragraphs (a) and (d) of Section 216, Part II, Interstate Commerce Act; Section 316, Title 49 U. S. C. A.

7. The attempt of the Commission to divide shippers of general commodities into classes consisting of owners of such commodities in one class, and freight forwarders in another, and then limit appellee as a common carrier of all such general commodities to the freight assembled by the class known as freight forwarders, is a capricious, unreasonable, unlawful act, having no real or substantial relation to the object sought to be attained, and is in direct conflict with the Fifth Amendment to the Constitution, and violative of said Section 216, *supra*.

A shipper is not a commodity, and shippers cannot be classified for the purpose of requiring common carriers to

serve one class designated as freight forwarders, to the exclusion of owners, and all other classes.

8. A suggestion is made on page 8 of appellants' brief that appellee expressly waived its right to claim that the restriction in the order which is now complained of is void; the question of waiver of a right is one of fact, which must be alleged and proven; no finding was tendered by appellants to the court below which correctly presented the facts upon such question; there is no finding that even hints that any right was waived by appellee; there is no assignment of error which presents any such question to this court, and such suggestion, and the argument concerning the same, should be disregarded,

Rule 27 of this Court.

*Seaboard Air Line Ry. Co. v. Watson* (1932), 287 U. S. 86.

9. It is contrary to public policy to permit the Commission to promulgate a void order, one which will cause plaintiff to sustain irreparable damage, and then allow the Commission to urge that the plaintiff waived its right to object to such illegal order; the Fifth Amendment provides that plaintiff shall not be deprived of its property without due process of law, and every reasonable presumption should be indulged against such waiver; the question is a jurisdictional one, going to the subject matter of the litigation, and cannot be waived by a party; the law fixes the duties and obligations of the parties, and the Court cannot disregard them.

*Hodges v. Easton*, 106 U. S. 408.

Fifth Amendment.

10. The attempt of the Commission to freeze appellee to the transportation of general commodities which are moving on bills of lading of freight forwarders, alters very materially the basic characteristics of the service which appellee has been rendering (that of a common carrier) since the unification Order of the Commission of May 16, 1942; arbitrarily confiscates its property without due process of law, without the basis or essential findings of convenience and necessity therefor, and is a gross violation of appellee's constitutional and statutory rights.

*United States v. Carolina Freight Carriers' Corp.*  
(1942), 315 U. S. 475.

## ARGUMENT

### JURISDICTION

#### Granting of Appeal by Single Judge

We deem it unnecessary to set out herein any of the matters appearing in appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, which was filed pursuant to paragraph 3 of Rule 12; the statement has been separately printed and we understand it to be a part of the record; we respectfully urge that our position is well founded and believe this Court has no jurisdiction of this appeal.

Appellants, in their argument on the jurisdictional questions presented, have grounded their position on a false premise; that is, they assume the appeal is from an adverse judgment of a single judge district court; consequently, they place their reliance on Section 47-a, Title 28 U. S. C. A., and attempt to divert attention of the court from Section 47, Title 28 U. S. C. A., which is the section under which the cause was tried, and which sets upon a complete course of procedure, including appeal.

Section 47 is a law of restriction and limitation upon the powers of a single district judge; it is a grant of power to three judges; whatever power a single judge has under this statute, must be found in the statute itself; if no rights are granted to a sole judge under the Act, then he can perform no acts alone.

Our position in this regard is justified by the reasoning and decision of this Court in *Ex Parte Metropolitan Water Co.* (1911), 220 U. S. 539, where the Court considered the effect of Section 266 of the Judicial Code, which creates a



three judge court to hear suits to enjoin state statutes; true, the question there arose upon the granting of a temporary injunction, but, nevertheless, the court very carefully pointed out that suits of this character should be heard before a court consisting of three judges, and not one judge alone, and that limitations are unequivocally placed upon the power of the single judge to act, and a single judge of a special statutory three judge court has no power to do any act which is not expressly given him by the act creating such court.

Congress recognized the propriety of such position when it passed the Act of April 6, 1942, 56 Stat. 199, expressly providing that a single judge might do certain acts, and specifically designated such acts, and very clearly provided that all such acts must be those which should be subject to review at any time prior to final hearing by the three judge court; it failed to give a single judge any power to act on matters occurring at, or subsequent to the final hearing; Congress, having legislated expressly upon the subject, after this court had pointed out that authority for acts of a single judge must be found within the statute itself, and having failed to give a single judge any power to act subsequent to final judgment, it must be presumed that it did not intend to give a single judge any such power subsequent to final judgment.

But appellants endeavor to brush this question aside on two erroneous propositions; (a) the granting of an appeal is a ministerial act (appellants' brief, pp. 5-7); and (b) nothing can arise subsequent to final judgment that calls for action by three judges (note 4, p. 17, appellants' brief).

We concede that the lower court could not sit in judgment on its own alleged errors, and deny an appeal because it thought there was no merit in the errors assigned, and to such extent it may be properly argued that the appeal was a matter of right. But this does not reach our question; *this petition for appeal was not presented within the time fixed by law; it was not presented until after one of the parties had filed a petition in the lower court asking the court to vacate its judgment of May 25th and render a new judgment of a later date so it could take an appeal within the time prescribed by the statute; it was allowed by a single judge; these matters are judicial questions; under the argument of appellants, a single judge could have sustained the motion filed on July 5, 1944 (Exhibit A, pp. 15-16 of Statement), asking that the three judge judgment of May 25th be set aside and given a new date so that an appeal could be taken within the time allowed by the statute, because, as they urge on page 17 of their brief, nothing can happen after final judgment that would require the action of three judges; but two things did happen; one, the filing of the motion to set aside and re-date the judgment, and the other, the filing of a petition for appeal after the time had expired.*

The conduct of appellants in this appeal, and of appellant in Cause 449, presents a very unusual situation; the appellant in 449 filed its petition on July 5th *asserting that the time for appeal had expired*, and endeavored to get the judgment re-dated; appellants in this appeal thereafter came in and presented their petition for appeal to a single judge of the court that heard the cause; judged by the argument of appellants, such procedure would deprive appellee of its right to have the motion to set aside the judgment, and the petition for appeal, presented to the

three judge court that heard the cause, although it was then conceded by one appellant that it was too late to appeal.

In *Credit Co. v. Ark. Central Railway* (1888), 128 U. S. 258, it is said that:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court."

If the single judge had the right to grant the appeal, and decide that the appeal was taken in time, such act deprived the three judge court of its further jurisdiction; thereafter, the three judge court would have been denied the right to pass upon the question presented of vacating the judgment and re-entering it as of a new date.

Again, we refer to the decision upon this question as it relates to Section 266, Judicial Code, in *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.* (1922), 266 U. S. 212, where the court says:

"We are of opinion that a single judge has no power, in view of Section 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid \* \* \*. This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration."

The court further suggested that in cases of this character, the proceedings are special, "in which the power of a single judge is definitely limited."

In *Bartemeyer v. Iowa* (1871), 14 Wall. 26, this Court held that a writ of error signed by an associate justice of the Supreme Court of Iowa, composed of a chief Justice and three associates, was not sufficient to give the Court jurisdiction of the cause; the Court differentiated between a court composed of a single judge and one composed of more than one judge.

*We think it will lead to confusion for this Court to hold that a single judge of a statutory three judge court can grant a petition for appeal, and thus oust the trial court of further jurisdiction, and cut off the right of the three judges to pass upon the many questions which are apt to arise following the final judgment.*

Nor should this Court construe its Rule 36; or Rule 72 of the Rules of Civil Procedure, so as to authorize a single judge to have such unlimited power after final judgment; neither of such Rules contemplate turning over to a single judge of a three judge court any right or authority to oust such court of its jurisdiction simply because it has rendered a final judgment; these Rules relate to ordinary trials before a single judge district court.

#### GRANTING OF APPEAL AFTER EXPIRATION OF STATUTORY TIME

A very labored argument is presented by appellants between pages 17 and 34 of their brief in an effort to convince this court that an appeal may be taken within 60 days

after the entry of final judgment in a case brought to set aside part of an order of the Commission.

The simplest answer to this argument is to read the statute which sets up the procedure for suits of this character; the matter of appeal is governed by a very short paragraph in Section 47 reading as follows:

*"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply"* (emphasis supplied).

This is a statute of limitation upon the powers of a single judge, and upon the acts and conduct of the parties; the final hearing must be by three judges, and the same haste is required as to trial and appeal as is provided for in relation to the interlocutory injunction; appellants would have the Court read out of the statute the words "the same requirement as to judges and the same procedure as to expedition and appeal shall apply"; they would strike down the command of Congress that where the Commission's order has been finally set aside, the appeal must be taken in 30 days, although they concede that appeal from an interlocutory order must be taken within 30 days; the statute says that the procedure as to expedition and appeal shall be the same; appellants are not only compelled to strike out such quoted words from section 47, but they are obliged to resurrect and rewrite section 47-a, because



it was repealed by the passage of the Act of February 13, 1925, 43 Stat. 936-938; resurrection was not deemed adequate; a re-write was necessary, and the words "in the cases specified in section 44 of this title" (28) were inserted, *not by Congress*, but apparently by the annotators of the code; we most earnestly urge that this repealed Act (47-a) cannot be thus revived and re-written by Code annotators, and then used in this Court to thwart the express mandate of Congress that appeals of this character must be taken in 30 days.

In *Smith v. Wilson* (1927), 273 U. S. 388, this Court held that the repealing act of February 13, 1925, 43 Stat. 938, cited and relied upon by appellee above, and on page 6 of its Statement Opposing Jurisdiction, was so broad that a Special Amendment to Section 266 of the Judicial Code was necessary to save and provide for appeals direct to this Court under said section.

That our position in this regard is sound, is further clearly evidenced by the declarations and conduct of the appellant in Cause No. 449; with due deliberation, it went into the lower court on July 5, 1944, and filed its petition, sending a copy thereof to each of the three judges (Statement 13), and asked them to set aside their judgment of May 25, and re-enter it as of July 1, the only reason assigned being,

"(5) That the time for taking an appeal from the judgment of this Court had elapsed when notice of judgment was received," (which was July 1, 1944). (See Statement 15-16.)

This particular appellant had failed to appoint counsel resident in Marion County, as required by a local court rule, and claimed it was not notified of the lower court's

judgment until July 1 (Statement 15); it was then reading the appeal statute the same as appellee; it then understood the appellate provisions of the law the same as appellee understands them; in fact, in so far as we know, it is still of the same opinion; on page 2 of its brief in Cause No. 449, it contents itself with citing both sections 47 and 47-a as supporting the jurisdiction of this court. Judging from the only constructive declaration it has made upon the question of jurisdiction, it will have to be aligned with appellee in asserting that the time for appeal had expired, because, although jurisdiction has been challenged ever since August 2, 1944, and this Court, on November 6, 1944, was especially considerate and postponed the decision of the question of jurisdiction to the hearing on the merits, undoubtedly to give the parties further opportunity to brief the question, yet, such appellant has never explained why it went into the lower court on July 5th and tried to convince the three judges that the time for appeal had then expired; this Court is now confronted with the very unusual and anomalous situation of two appellants appealing from the same judgment, one claiming that the appeal was taken in due time, and the other having claimed in the lower court that the time for appeal had expired, and now offering no explanation to this Court for such position. Appellants in this appeal may have reasoned that under such circumstances it was better to treat the matter of appeal as a ministerial act, and not permit the appellee, or their co-appellant, to be heard on the right of appeal before the three judges at that time; they may have concluded that a joint conference of the three judges was then inexpedient. However they may have reasoned, we contend that the appeal had to be taken within thirty days from May 25th.

## FORMER DECISIONS OF THIS COURT

Beginning on page 32 of their brief, appellants rely upon former decisions of this court and its uniform practice as demonstrating that appellee's position on these jurisdictional questions is untenable.

We respectfully challenge this statement, and urge that former decisions of this court made in cases where our questions were not presented, cannot be relied upon by appellants as committing this Court, or binding appellee, to a practice which demonstrates that our position is untenable; we are not bound by former decisions, unless our questions were presented and decided; appellants do not contend that our questions were raised in any of the cases cited on pages 32 and 33 of their brief, except in *Interstate Commerce Commission v. Columbus and Greenville Ry. Co.*, 319 U. S. 551, and we pointed out in our reply brief heretofore filed on our jurisdictional statement, page 4, that there was no jurisdictional statement filed in that case as required by Rule 12, and the question was not presented as to repeal of Section 47-a.

Appellants have not pointed out how any injurious consequences will result from deciding the present appeal correctly; they do not claim that any rule of property rights is involved; the most they do is to say that the Court, in cases where our questions were not presented, has committed itself to a policy which makes our position untenable.

But appellee's constitutional rights are at stake; its property is being confiscated; it was admitted by appellants in the court below that

"If the Court should find that this final order complained of is invalid and the Commission had no

power in the premises to make it, it should be set aside" (R. 92);

the lower court found this situation existed (R. 73); if this position be correct, it does not seem that appellants should be permitted to prevail here upon the proposition that this Court has heretofore decided cases, where appellee's questions were not presented, that demonstrate its position to be untenable.

If the series of decision referred to by appellants are incorrect, it is because the questions were not properly presented to this Court therein for decision; the argument of appellants in this appeal was made to this Court in *Webster v. Fall, Secretary of the Interior* (1925), 266 U. S. 507, and was disposed of as follows:

"Counsel for appellant directs our attention to other cases, where this court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

To the same effect is *KVOS, Inc. v. Associated Press* (1936), 299 U. S. 269.

Perhaps more directly in point is the principle laid down by the Court in *John T. New v. Territory of Oklahoma*, 195 U. S. 252, where the Court decided that it would

not consider itself bound on the question of its jurisdiction by a prior case in which jurisdiction was entertained without any suggestion as to the want of it.

We respectfully urge lack of jurisdiction in this appeal.

### **ARGUMENT ON THE MERITS**

If the Court concludes to pass upon the merits of this appeal, then it becomes necessary to consider appellee's statement of the questions actually presented; appellants say on page 35 of their brief that the principal question for determination is:

Whether the Commission may lawfully grant to appellee operating authority confined to transportation of commodities "moving on bills of lading of freight forwarders."

#### **Question Actually Presented.**

We do not think the above statement accurately presents the question for decision, and we now state it to be as follows:

The Commission found as a fact that Globe was in bona fide operation as a common carrier by motor vehicle since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities of every class, type and character, (with certain exceptions as to bulk, etc.), within the provisions of the grandfather clause, Section 206 (a), Part II of the Interstate Commerce Act, *having made such finding, it thereupon became the mandatory duty of the Commission to grant appellee, as Globe's successor, an unlimited certificate of convenience and necessity under Section 206*



*"without further proceedings"; failing so to do, the Commission has clearly misapplied the law to the facts found by it.*

In addition, there are very cogent legal and equitable reasons, arising from and growing out of the order made by the Commission on May 16, 1942, which impel the affirmance of this judgment.

### ORDER OF MAY 16, 1942

In order to better understand our contention concerning the consideration to which appellee is entitled by reason of the peculiar facts in this record, we call to the Court's attention the substance of certain undisputed facts, which were found by the Commission, and upon which it predicated its order of May 16, 1942, which directly affected appellee, and operated upon its property rights which are involved in this proceeding: for this purpose, reference is now made to pages 100 to 104 of the Record, from which we summarize the following facts:

Hancock Truck Lines, Inc., of Evansville, and Globe Cartage Company, Inc., of Indianapolis, by joint application filed December 23, 1941, asked for authority under Section 5 for purchase by the former of operating rights of the latter for \$10,000; on June 10, 1940, the Commission had issued an amended certificate to Hancock authorizing operations in interstate or foreign commerce as a motor vehicle common carrier of general commodities (a) over regular routes, serving specified intermediate and off-route points between Evansville and Chicago, Illinois, via Vincennes and Terre Haute, Indiana, between Evansville and Henderson, Kentucky, between Evansville and Louisville, Kentucky, between Vincennes and St. Louis, Mo., between Terre Haute and

Indianapolis, Indiana, and between Evansville and Detroit, Michigan, via Vincennes, Indianapolis, Ft. Wayne and Angola; under rights confirmed by the Commission, Hancock also conducted regular route operations between St. Louis and Louisville, via Vincennes, and operated over certain short-cut routes between Evansville and Indianapolis; it was then utilizing substantially more than twenty motor vehicles in its operations; at that time Globe was transporting general commodities in interstate or foreign commerce pursuant to two pending applications filed under the "grandfather" clause; under its application No. MC-3339, it claimed rights as a common carrier, serving all intermediary points, over routes, in territory, bounded on the east by Buffalo, New York and Pittsburg, Pa., on the south by Wheeling, West Virginia, Columbus and Cincinnati, Ohio, Louisville and Evansville, on the west by St. Louis and Peoria, Illinois, and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pennsylvania; in said proceeding the Commission considered only the operations of Globe as a common carrier and its findings therein were said by it to authorize the purchase only of Globe's rights to operate as a common carrier (R. 100).

The Commission found that by agreement dated November 4, 1941, Hancock would purchase the operating rights of Globe under Nos. MC-3339 and MC-3340 for \$10,000, of which \$100 had been paid as of the date of the agreement, and the remainder would be paid \$2,500 upon approval of the transaction by the Commission, \$2,500 upon final approval by the last of the concerned State Regulatory Authorities, and \$4,900 within ten days thereafter, and that Hancock's stockholders had agreed to contribute sums equal to the purchase price at the times and in the amounts necessary to meet the payments required under the agreement.

Hancock's balance sheet as of September 30, 1941, showed assets aggregating \$109,984; Globe's balance sheet as of the same date showed assets aggregating \$166,153.

With certain exceptions, principally between Evansville and Prospect, Evansville and Indianapolis over certain short-cut routes, and Angola and Detroit, via Coldwater, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive. Both carriers then served Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points. Approximately 65 percent of Globe's traffic consisted of business handled for a forwarding company, and as a result its flow of traffic was unbalanced. As an example, Globe's traffic was heavier west into St. Louis than in the reverse direction, necessitating dead-heading of equipment from that point. Hancock, on the other hand, enjoyed heavier traffic east out of St. Louis than in the reverse direction. Globe did not believe it would be justified in expending additional funds in an effort to develop a better balanced operation, and, as its functions and facilities substantially duplicate those of Hancock, the desired result could be accomplished through unification of the operations in Hancock. The unification would result in better balanced lading between the common points then served, and in certain instances, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes. Hancock had the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing additional equipment of owner-operators as at pres-

ent, or by purchasing additional equipment. Savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually. No arrangements had been made respecting Globe's equipment, but it was the intention of the parties to dispose of all the assets and surrender its charter for cancelation. Globe's regular employees would be afforded an opportunity to join Hancock's organization. Other competitive common carriers of property then operated throughout the considered territory. The proposed unification is in line with our purpose of encouraging corporate simplification in the interest of economical and efficient transportation (R. 102).

The Commission found that the purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions it found to be just and reasonable, was a transaction within the scope of section 5 (2) (a) and would be consistent with the public interest, and that, if the transaction was consummated, and pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should be entitled to conduct the common-carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and would be entitled to a certificate covering any "grandfather" common-carrier rights which might be confirmed as a result of those applications, which rights were therein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated (R. 104).

The lower court found as a fact that following said findings and order of the Commission of May 16, 1942, appellee, Hancock Truck Lines, Incorporated, in reliance on such findings and order, paid to Globe said \$9,900, the balance of the purchase price for such common carrier operating rights (R. 72); it further found that in reliance upon said findings and order of May 16, 1942, appellee completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as a result of its grandfather applications aforesaid with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission over the routes aforesaid; appellee thereafter continued to operate under said order of unification, and unified the common carrier rights of both of said companies as authorized by the Commission up to the time of the trial, to the extent and in the manner as set out in paragraph 18 of its complaint (R. 72); that is to say, as a result of such unification order of May 16, 1942, up to the time of the trial, appellee had built up an annual business between Indianapolis, Indiana, and St. Louis, Mo., of approximately 13,200,000 pounds, 60% of which represented tonnage tendered to it by others than freight forwarders; between Louisville, Ky., and Chicago, Illinois, the approximate yearly tonnage was 34,660,000 pounds, 50% of which was that tendered to appellee by others than freight forwarders; from Cincinnati, Ohio, to Chicago, Ill., appellee was handling approximately 5,760,000 pounds of freight per year that was not moving on freight forwarder bills of lading; if that part of the order complained of is enforced, appellee will at once be deprived of such val-



uable operating rights, and it will suffer a loss and damage of approximately \$75,000 per year on account of the loss of revenue on said routes and will destroy appellee's right to receive general commodities direct from the true owners thereof (R. 9).

There was no issue as to these facts in the lower court; appellants' answers treated them as being immaterial and irrelevant (R. 54-58); at the trial, they admitted that appellee's business would be taken away from it, and said they had not raised any question as to these facts in their answers, and asserted that the matter of monetary damage was not in dispute; reference is made to page 92 of the Record, where the discussion arose as to the introduction of evidence by appellee on its allegation of irreparable injury and damage, for the following colloquy:

"Judge Baltzell. You are admittiting, are you, that, if this is taken away, it would be taking their business away from them?"

Mr. Thomas. Yes sir; and we do say that, if the Court should find that this final order of the Commission is invalid and the Commission had no power in the premises to make it, it should be set aside. In other words, I think that takes care of this question of specific monetary damage.

Mr. Ward. Well, I don't want to be confronted with a moot question. I want this record to show that we are damaged.

Mr. Thomas. Neither of us raised that question in our answers.

Mr. Weiss. And you agree, now, that we don't have to submit proof on that?

Mr. Thomas. *If the Court finds that this order of the Commission is void, it should be set aside*" (emphasis supplied).

Mr. Thomas represented the Interstate Commerce Commission at the trial (R. 89).

### ESTOPPEL AGAINST COMMISSION

The Commission is bound by the same rules of estoppel which control individuals, and the rights of the parties must be determined upon the fixed principles of justice which govern between man and man in like situations; *United States v. Stinson* (1905); 197 U. S. 200; *Walker v. U. S.* (1905), 139 Fed. 409; *U. S. v. Denver* (1926), 16 Fed. (2) 374 (8 CCA); *State of Iowa v. Carr* (1911), 191 Fed. 257 (8 CCA); as the Court says in the *Stinson* case:

“The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.”

In the *Walker* case, the court held that:

“When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case, work an estoppel against the Government.”

We believe that if the facts in this appeal involved ordinary parties, and it was shown that appellee had been

induced to expend \$9,900 on the representations of its adversary that certain things would be done, and thereafter pursued a course of conduct prescribed by such adversary for a period of years, and, in so doing, changed its position to where its property and business to the extent of \$75,000 per year would be destroyed if the adversary were allowed to change its course, this Court would have no hesitancy in enjoining such adversary from such wrongful conduct; the sovereign should not be permitted to successfully urge such procedure.

### **PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES FIFTH AMENDMENT**

The order of May 16, 1942, was made by the Commission pursuant to Section 5 of the Interstate Commerce Act, upon notice and full hearing; such order clearly defined and furnished the foundation for the creation of certain property rights, and directed that certain things must be done by appellee; such property rights can not now be destroyed by the Commission by any order made by it in this proceeding; a hearing and decision under Section 5 can not be confounded and intermingled with a hearing on an application under Section 206; the issues are entirely different; the order entered under Section 5 was very comprehensive, and not only impliedly authorized but directed, appellee to pay Globe \$9,900 for its common carrier operating rights, unify its common carrier rights with those of Globe, and eliminate duplications of traffic, all of which was said by the Commission in that proceeding to be consistent with the public interest; such order can not now be collaterally set aside by the Commission; a change in such order can only be made "for good

cause shown", as provided by (9) Section 5; the Commission found that it was "just and reasonable" to encourage appellee to spend its money in the elimination of overlapping functions, and reduce the mileage of empty truck operations, in the "interest of economical and efficient transportation." But what has happened in the meantime to change all of these things which were so commendable on May 16, 1942? Nothing, except in August of 1943, the Commission found that on June 1, 1935, Globe was in fact a common carrier of general commodities as defined by the Interstate Commerce Act, but it was then only receiving freight from freight forwarders; this is the sole excuse of the Commission for writing the order complained of limiting appellee's operations to the receipt of freight from freight forwarders; but its order of May 16th was based upon a finding by the Commission that the proposed unification transaction was "consistent with the public interest" and its "terms and conditions" were found by it "to be just and reasonable" (Section 5 (b)). Before such order of May 16, 1942, can be set aside, or its virility nullified by any subsequent action of the Commission, the appellee is entitled to notice of any hearing to be had by the Commission for any such purpose and entitled further to be fully heard thereon. It has had no such notice and no hearing, our position being that such an action is not properly included within the application for a certificate under the grandfather clause of Section 206, and was not within the issue tendered by Globe's application; consequently, the present order of the Commission will clearly deprive the appellee of its property without due process of law, in violation of the Fifth Amendment. It has had no notice and no opportunity to be heard upon the question as to whether it is consistent with the public interest, and

just and reasonable for it to go back to, and hereafter occupy, the unfortunate financial dilemma from which it, under the unification order of the Commission, extricated Globe in 1942; pursuant to which order it has built up a substantial business, and before appellee can be compelled to re-establish duplications in the transportation service, and the dead-heading of empty trucks, which useless and unnecessary acts were eliminated by the order of May 16th, it must have a lawful hearing on those issues and upon the conditions in relation thereto as they are found to exist at the time of such hearing, upon the theory of reasonableness and consistency with the public interest. The Commission can not destroy these rights by an indirect or collateral order.

In *McClellan Trucking Co.* (1943), 321 U. S. 67, this Court upheld a unification order made by the Commission because it had found and determined that the proposed consolidation was "consistent with the public interest," and the terms and conditions thereof were "just and reasonable," and that these were matters which were peculiarly within the power of the Commission to determine. On May 16, 1942, the Commission found and determined that these salutary statutory conditions existed as to the consolidation of Globe's common carrier rights with those of appellee; the question now before the Court is:

Can the Commission, after having authorized such unification on such findings and conclusions, enter a collateral order which will destroy the improved transportation service obtained thereby, and which will confiscate and destroy appellee's property?

We most sincerely urge that the Fifth Amendment forbids such action by the Commission, and before any



such changed order can be entered by it there must be proper notice given to appellee, and an opportunity to be heard, and there must then be a finding by the Commission that such changed order will be consistent with the public interest, and likewise be just and reasonable.

This Court summarized certain of the matters which the Commission found had properly entered into the consolidation order in the *McClean* case as follows:

"The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to more efficient use of equipment and save motor fuel. Terminal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced."

These matters bear especially upon whether the merger is consistent with the public interest. It is equally important that the findings show that the order will be "just and reasonable": this provision is primarily for the protection of the property rights of the carriers involved; conceivably, it might be consistent with the public interest to require the carrier to dead-head ~~the~~ trucks, travel with empty vehicles at times, and maintain some duplications of facilities, but this would not justify the Commission in making an order compelling it to do so, unless it was also found that it was a just and reasonable requirement.

In the instant case, the Commission made and entered consolidation order on May 16th, 1942; appellee thereupon invested its \$9900 on the strength of such order; it unified the service; it improved the transportation;

gave greater efficiency of operation; avoided duplications; reduced the empty truck miles traveled; balanced the traffic, and enhanced the stability and safety of the public service rendered; in so doing, and as expected and intended by the Commission (as it was in line with the Commission's purpose of encouraging corporate simplification in the interest of economical and efficient transportation), appellee built up a common carrier transportation service, which, at the time the judgment was rendered below, amounted to many thousands of dollars annually, and moved each year 7,920,000 pounds of freight between Indianapolis and St. Louis, 17,330,000 pounds between Louisville and Chicago, and 5,760,000 between Cincinnati and Chicago, none of which was received by it from freight forwarders, and all of which is to be wiped out, if the order complained of herein is permitted to stand.

The order of May 16, 1942, is a vested property right of appellee, and it cannot be taken away from it, except in the manner provided by law; appellee cannot be divested thereof by any hearing or proceeding had under Section 206; the issues of "consistency with the public interest" and whether it is "just and reasonable" to thus destroy its business are not within the purview of Section 206, and such issues must be presented, heard upon notice, and properly decided before such vested property rights and its business shall be taken away from it. We believe that as long as the order of May 16th remains in force, and it will so remain until a direct attack is made thereon, it confers contractual rights which are vested in appellee, and which cannot be taken from it except in the manner provided by law; the Fifth Amendment forbids such procedure; *Lynch v. United States* (1938), 292 U. S. 571.

## PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES SECTION 206(a)

The Commission found that Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, with immaterial exceptions; it found that Globe was a common carrier by motor vehicle and that it was entitled to authority to continue operations as such; it found that it was without power to restrict or limit Globe's operations in a manner which would change its status from that of a common carrier (R. 68); having found such facts, it was the mandatory duty of the Commission to issue an unlimited certificate to appellee; appellee was either a common carrier or it was something else; the Commission found that it was a common carrier, and it had the power to so find; the Commission had no lawful right to deny appellee the certificate which Congress has said it was entitled to, pursuant to that part of Section 206 (a) which reads as follows:

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring farther proof that public convenience and necessity will be served by such operation and without further proceedings." (Emphasis supplied.)

Just how Congress could have couched the duty of the Commission in plainer language is hard to understand: if the applicant was a bona fide common carrier, no further proceedings were proper to determine whether it was

at that particular date receiving freight only from a portion of the public known as freight forwarders (a shipper and consolidator of freight for the general public); if it was a common carrier, it was engaged in the transportation by motor vehicle in interstate or foreign commerce of property for compensation, and under the law it had the right to thereafter expand its business as such to include the transportation of freight tendered to it by all shippers; this was not only recognized by the Commission as being proper in its order of May 16, 1942, but the Commission found it was advisable to augment the common-carrier rights of Globe by unifying them with the common-carrier rights of appellee; under these undisputed facts, the Commission had no lawful right to place the limitation complained of in appellee's certificate.

In *United States v. Maher* (1939) 307 U. S. 148, this Court said:

"But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time'."

The facts thus referred to by this Court were found by the Commission to exist, and it had no authority, under 206 (a) to limit the certificate to freight moving on bills of lading of freight forwarders. It was required to issue a certificate as a common carrier—"without further proceedings."

**PART OF COMMISSION'S ORDER COMPLAINED OF  
IS VIOLATIVE OF SECTION 216 (d)**

The Court found that appellee, as a common carrier of property by motor vehicles, has and does provide safe and adequate service, equipment, and facilities for the transportation of general commodities in interstate and foreign commerce, and has established, observed, and enforced just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property, and has fully complied with all the rules and regulations of the Commission in relation thereto in so far as they were in effect at that time (R. 70).

The Commission found that appellee was a common carrier, both in 1942 and in 1943; being in fact a common carrier, appellee is prohibited by Section 216 (d) from giving any undue or unreasonable preference or advantage to any person in any respect whatsoever; it could not accept freight from one class of shippers, and decline it from other classes; it could not decline to receive freight properly tendered to it by owners of property as distinguished from agents or freight forwarders; not only its rights, but its duties, are fixed by law, and for a violation thereof it is subject to the imposition of penalties; the Commission can not lawfully, under Section 216 (d), place appellee in such inconsistent position.



## VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS CAPRICIOUS

No reason other than mere caprice can be advanced for that part of the order complained of; on May 16, 1942, the Commission entered a solemn finding that the handling of freight by Globe which was restricted to freight-forwarder business, unbalanced the flow of traffic of Globe, and that it would have cost Globe approximately \$20,000 to overcome such situation in 1942; it found that by the unification of Globe's traffic with the appellee's traffic, economical transportation would be supplied, duplications of service avoided, and the combination of these would be consistent with the public interest. (R. 102-103-104.)

Now, it proposes to compel appellee, as a common carrier, to go back to the carrying of freight tendered only by freight forwarders, and thus lose its money, have its business and property destroyed, completely disorganize the economical transportation which it found would result from unification, and wholly disregard its former finding that such unification would be consistent with the public interest; such an order, without facts and reason being found to support it, must fall within the realm of mere caprice, and should not stand; it will place appellee in a worse position than Globe occupied in 1942; Globe was then losing money and carrying on an unbalanced business with only 65% of its commodities being received from freight forwarders; but appellee can accept no property at all except from freight forwarders; such conduct seems to emphasize the lack of apparent motivation, and at least implies wantonness; the void portion of the Commission's order complained of is capricious, and should be enjoined.

# **VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS UNREASONABLE**

The limitation complained of is clearly unreasonable; if enforced, all of the business which appellee has built up under the unification order of May 16, 1942, will be destroyed; appellee will be compelled to go back to a transportation business which was, and will be, unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it will be compelled to duplicate operations over routes covered by its other certificate; it must give a duplicate operation between Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, Chicago, and other points; the saving in overlapping functions, including terminal and pick-up and delivery facilities, reduction in truck miles operated, and through increasing the use factor of vehicles transporting heavier loads, and which were estimated by the Commission to be in excess of \$50,000, will all be lost to appellee (R. 70-74-72).

In 1942, the Commission found that it was "just and reasonable" for appellee to pay Globe \$10,000 for the common-carrier operating rights involved in this proceeding; it found that it was "just and reasonable" to eliminate duplicate terminal facilities then maintained by Globe and appellee; it found that it was "just and reasonable" to eliminate Globe's unbalanced traffic which was caused solely by the fact that 65% of its business was received from freight forwarders; it found that it was "just and reasonable" to avoid the dead-heading of equipment by Globe; it found that it was "just and reasonable" to save \$50,000 annually by the consolidation of overlapping functions, reduction in truck-miles operated empty, and the factor of operating vehicles with heavier loads;

it found that all of these things were "in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation"; it found that all thereof would "be consistent with the public interest" (R. 103-104). If these matters were "just and reasonable" then, they are just and reasonable now; if they are just and reasonable now, then the limitation of which we complain is a most astounding and startling exhibition of unreasonableness, because it will force appellee back to the unfortunate position of Globe, without restoring the \$10,000 which appellee paid to Globe, and compel appellee to carry on the losing business of handling freight tendered to it only by freight forwarders, going back once more to dead-heading, duplicating routes and services, moving partially loaded trucks, and traveling many unnecessary empty truck-miles.

We submit that the Commission has neither power nor authority to promulgate such an unreasonable order, and thus destroy the business and property of appellee.

When all of the facts in this case are considered, it will be found that the part of the order complained of is so capricious, arbitrary, and unreasonable as to shock the conscience of the Chancellor, and the order should not stand.

### **JUDGMENT OF DISTRICT COURT IS NOT VIOLATIVE OF COMMISSION'S ADMINISTRATIVE FUNCTIONS**

On page 11 of their brief appellants make the point that the district court erred in setting aside the portion of the Commission's order containing the limitation to commodities moving on bills of lading of freight forwarders, while leaving the rest of the order in force. This was

proper practice, and did not amount to the exercise of an administrative function conferred on the Commission by Congress; the Commission's order was clearly divisible; the void and illegal part could be very readily separated from the valid portion; the Commission found appellee to be a common carrier within the provisions of the grandfather clause in section 206 (a); it was thereupon its mandatory duty to issue appellee a certificate, without limitation, and without further proceedings; having failed to comply with the law, and the limitation being void, appellee was clearly within its rights in rejecting the void part of the grant, and accepting the valid part. This method of procedure is clearly established and recognized in *United States v. Chicago, M. St. P. & R. Co.* (1930), 282 U. S. 311, wherein the court says:

"It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

### **REMAND IS NOT PROPER REMEDY**

But, on page 12, and in argument on pages 46-48, appellants suggest that if the Commission's order was based upon an improper application of legal standards, the case should have been remanded to the Commission "for appropriate action by that body in the light of applicable law." All that the Commission could have done upon such remand would be to remove the objectionable limitation from appellee's certificate: this the court could do as well as the Commission; no complaint was made as to the facts

actually found by the Commission; neither party to this action claimed in the lower court that the Commission had not found as a fact that appellee was a common carrier within the purview of the grandfather clause; it was conceded that the Commission also found that appellee had the right to continue operations as a common carrier, and that the Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier; the facts in relation to and surrounding the making of the Commission's order of May 16, 1942, are not in any manner in dispute; our claim is that the Commission misapplied the law applicable to an uncontroverted and undisputed state of facts; in such situation, we think it would be highly improper to remand the cause to the Commission, and the lower court certainly would have been derelict in its judicial duty if it had shirked the responsibility of enjoining a void order on undisputed facts; in applying the law to the facts found by the lower court, no further weighing of evidence was required; no administrative function remained; no intricacies of the transportation problems were then involved; all questions of fact were settled; no suggestion is made by appellants that any further facts were to be found by either the court or the Commission; in fact, nothing remained for the Court to do but to apply the fixed principles of justice and law which govern between man and man in situations of this character; this is what the court did, and there is no reason for remanding the cause to the Commission for appropriate action by that body in the light of applicable law; the Commission saw the "light" when it said that it was "without power to restrict or limit (appellee's) operations in a manner which would change its status from that of a common



carrier", but it failed to be governed by such light in the application of the law. In the *Carolina Freight Carrier's case*, supra, this Court held that it was no intrusion into the administrative domain of the Commission for the Court to strike down the void limitations which were placed in the certificate by the Commission; it was said to be an insistence upon the observance of those standards which Congress has made "prerequisite to the operation of its statutory command"; that cause was not referred back to the Commission. In the *Chicago M. St. P. & P. R. Co.*, supra, the cause was not remanded, but the order was enjoined.

Furthermore, upon a remand of this case, the Commission will have no power in this proceeding to enter any order which will change its order of May 16, 1942.

But there is still another reason why appellants are not entitled to a remand: they complain in this appeal that the lower court did not adopt their findings of fact and conclusions of law; but there is no suggestion in such findings or conclusions that there should be any remand; as we have hereinbefore pointed out, appellants took the position that if the order complained of is void, the lower court should set it aside (R. 92).

If, after the trial, appellants changed their mind and submitted an assignment of error presenting such proposal of remand, this would be an additional and persuasive reason for the requirement of a submission of such assignment of error to the three judges that tried the case, instead of to a single judge. Regardless of this proposition, appellants have no right to change the theory of the presentation of their cause to the lower court, and they

are now bound by their statement in the lower court to the effect that

"If the Court finds that this order of the Commission is void, it should be set aside." (R. 92).

### **EXHAUSTING OF ADMINISTRATIVE REMEDIES**

The question is not one of failure of appellee to exhaust its administrative remedies as argued on page 35; the order complained of "was a final order when this action was commenced" (R. 69); the appeal is direct from a void limitation in the Commission's order; there was nothing further appellee could do before the Commission when this action was brought and tried the Commission was threatening to enforce that part of the order complained of, and unless it had been enjoined by the court below, it would have enforced said void order against appellee (R. 69); the court expressly found that the "plaintiff has exhausted all of its remedies before the defendant, Interstate Commerce Commission" (R. 70); in view of this condition of our record, there is no justification for the argument of appellants that plaintiff failed to exhaust its administrative remedies, and the authorities cited in the footnote in support thereof have no bearing upon our question.

### **WAIVER**

But appellants urge on page 35 that appellee waived objection to the restriction limiting it to the carriage of traffic moving on bills of lading of freight forwarders.

Our position as to such alleged waiver is:

(1)° The right and duties imposed upon plaintiff as a common carrier impressed the matter of limitation of such rights and duties with a public duty which could not be legally waived by plaintiff, as such limitations are governed and controlled only by legal provisions and requirements; a common carrier can not waive provisions concerning its duty to the shipping public, as such waiver is prohibited by law.

Title 49 U. S. C. A., Sec. 316.

(2) It is contrary to public policy to permit the Commission to promulgate a void order, one which will cause plaintiff to sustain irreparable damage, and then allow the Commission to urge that the plaintiff waived its right to object to such illegal order; the Fifth Amendment provides that plaintiff shall not be deprived of its property without due process of law, and every reasonable presumption should be indulged against such waiver.

*Hodges v. Easton*, 106 U. S. 408.

We urged below, and repeat now, that it is improper for the Commission to set up a void order, and one which it is admitted will confiscate appellee's property, and then be heard successfully to urge that appellee waived its legal right to present such void order to a court for its injunctive relief (R. 98). Such procedure is clearly contrary to public policy. Such facts do not constitute a waiver.

(3) No issue was properly tendered of any waiver by the appellee; we objected to the introduction of evidence offered in support of such claim of waiver, because the answer does not contain the facts necessary to present such issue (R. 98); the statements in the answer which

attempt to present such issue are nothing but conclusions of law of the pleader, with no facts whatever to support the same (our objections to defendant's Exhibit 5, R. 98).

*Facts constituting* an estoppel (or waiver) must be pleaded specially, in order that the question of whether a party is estopped to act in a certain manner may be put in issue; *Town of St. John v. Gerlach* (1926), 197 Ind. 289; 150 N. E. 771;

"To claim an estoppel (or waiver) in so many words is merely to state a conclusion of law"; *City of Ironton v. Harrison Const. Co.* (1914), 212 Fed. 353 (6 CCA).

(4) Before there can be a waiver, there must be an existing right; appellee could not waive a right which did not exist; the Commission had denied its right to receive freight generally from shippers, and appellee gave up nothing in connection with its claim to the right to transport general commodities; consequently, there was no waiver; Vol. 27, R. C. L., Sec. 5, p. 908.

(5) To make out a case of waiver of a legal right, it must be shown that such waiver is supported by a valuable consideration, or the fact relied on as a waiver must be such as to estop the party from reasserting the matter so alleged to have been waived; no such facts are pleaded, proved or claimed by appellants in this case.

*Victor Products Corp. v. Yates* (1932), 54 Fed. (2) 1062 (4 C. C. A.);

*Hasler v. West India* (1914), 212 Fed. 862 (2 C. C. A.);

*Hunter Milling Company v. Koch* (1936), 82 Fed. (2) 735 (10 C. C. A.).

(6) The act relied upon to prove waiver must be shown to have been voluntarily done, with intent to waive, and in the absence of particularly urgent circumstances; the conclusion of waiver asserted in the answer was in connection with the issue then pending before the Commission wherein the appellee was seeking authority over approximately 83 different routes (including alternates), approximately 60 of which had been denied by the Commission; in addition to denying such routes, the Commission had restricted appellee to the receipt of freight on the remaining 23 granted routes from freight forwarders only; in such situation, the appellee was compelled to weigh and evaluate the ultimate rights which would inure to it by the further action of the Commission, and for procedural purposes solely in connection with its application for reconsideration, it took the position that it preferred to have a grant over the approximate 83 routes; it was unsuccessful in its position; the most that can be said is that for the purpose of the reconsideration, appellee proposed that if its 83 routes should be granted, it would give up its right to contest further the restriction which the Commission placed upon it; but it was unsuccessful, and there is no consideration for the claim now that it waived its right to contest such restriction in this subsequent independent action; that the alleged waiver was not voluntary, and was expressly conditioned upon its receipt of a certificate over the 83 routes, is plainly disclosed by the language used in connection therewith, appearing on page 143 of the Record, where appellee urged that:

*"To maintain our very life as a carrier, as a minimum, in view of the curtailment and limitation to the hauling for freight forwarders only, we be-*



lieve that we are entitled to no less than the right to use all convenient routes as set forth in Exhibits 30 and 31."

Thus, the failure of the Commission to grant appellee a certificate over the 83 routes applied for, very clearly released the appellee from its suggestion that it would contest no further on the question of restriction; in other words, appellee was unsuccessful in its position, the Commission yielded no ground, and there is no basis for the claim of waiver.

*Bowerman v. Detroit Free Press* (1939), 287 Mich. 443, 283 N. W. 642.

**COMMISSION DID NOT FIND THAT GLOBE WAS  
NOT HOLDING ITSELF OUT TO TRANSPORT  
PROPERTY FOR ALL SHIPPERS**

On page 36 of the Government's brief, it is said that the Commission's finding that during the "grandfather" period appellee's predecessor in interest transported no commodities other than those moving on bills of lading of freight forwarders and this statement can not be challenged by appellee, but this does not reach our question; however, the Commission itself challenged it by its finding and conclusion in its order of May 16, 1942, that Globe was transporting only 65% of its total for freight forwarders; we say the Commission found as a fact that appellee's predecessor in interest was a bona fide common carrier by motor vehicle of general commodities, prior to, on, and ever since June 1, 1935, and it found as a fact that it could not restrict its services to particular shippers, and that it was without power to restrict or limit its opera-

tions in a manner which would change its status from that of a common carrier. (R. 68).

The term "common carrier by motor vehicle" is defined by Clause (14), Section 203, Part II of the Interstate Commerce Act to be any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of property for compensation; it must be assumed that the Commission made the above finding advisedly and with an understanding of such definition; the Commission made no finding that appellee's predecessor was not holding itself out to the general public to engage in transportation by motor vehicle in interstate or foreign commerce of property for compensation; in the absence of a finding of this character, it can not now be said that simply because it had no shippers on June 1, 1935, except a freight forwarder, it must now be limited to receiving freight from freight forwarders in the future; it did have other business, because the Commission found on May 16, 1942, that 65% of its business was received from a freight forwarder, and the balance from general shippers; having been a bona fide common carrier by motor vehicle on June 1, 1935, it can not be limited to the exact number of customers it had on that date; nor can the shippers which it was then serving be designated as a class, and become the only class which could be served by appellee. As this Court said in *United States v. Carolina Freight Carriers Corp.*, (1942), 315 U. S. 475, it is not proper to freeze the operation of appellee into the precise pattern of its predecessor's activities on June 1, 1935; especially is this true in view of the unification order of the Commission of May 16, 1942.

## INCONSISTENCY OF COMMISSION'S DECISIONS

On page 37 of their brief, Appellants assert that:

"Courts are not concerned with the correctness of the Commission's reasoning, or the consistency or inconsistency, of its decision in a particular case with prior decisions which it has rendered."

The latter part of this statement, we believe, can not be applied to the facts in this case; the Court might not be concerned with the consistency of decisions of the Commission, where rendered upon a different state of facts and in cases involving different parties, but where the Commission rendered a decision on May 16, 1942, as to a party, and then later rendered a decision exactly opposite thereto, and which later decision will cause such party irreparable injury and damage, and wrongfully destroy the property rights which have been accumulated pursuant to the earlier order, without any reason other than caprice, then this Court will be interested in the consistency, or inconsistency, of the two decisions.

## SUBSTANTIAL PARITY

The "substantial parity" referred to in the decisions on page 38 of government's brief has no relation to or connection with the question at hand, for, in none of such cases did the Court have before it a previous order of the Commission affecting the rights of the same parties such as the one of May 16, 1942; in the *Alton* case the question was whether the applicant was a bona fide operator on June 1, 1935, it being shown that he was operating on highways in defiance of state law; the Court sustained the Commission's finding that he was not a bona fide operator; in the *Carolina* case, the court enjoined the Commission from placing unauthorized limitations in the certificate.

such as the elimination of commodities, which, though of the same general class as the others, had been carried before, but not after June 1, 1935, and the limitation to those commodities which prior to June 1, 1935, had been carried in substantial amounts and with a degree of regularity; we think the Court held in the *Carolina* case that limitations such as we complain of herein are unlawful; to require appellee to go back and haul empty and partially loaded trucks, as Globe was doing in 1942, and carry on Globe's former unbalanced transportation system, will drive the enterprise of appellee to the wall, and ruin it; this is what this Court in the *Carolina* case concluded could not be done by the Commission; the *Noble* case related to a contract carrier, where a different statutory standard is the guide for the Commission, the applicant wanted to haul certain commodities for any one who desired to use its service, and the Court approved the principle that a highly specialized contract carrier of fresh meats, canned goods, and dairy products for particular concerns could not properly have his business extended to that of a common carrier of general commodities; in the *Crescent* case, the Court held that to grant the applicant the right to change his business from sedans to that of carrying passengers by bus would alter the position in the transportation system which he occupied on June 1, 1935; none of these cases had anything to do with an order like the one of May 16, 1942; and none of them had anything to do with the division of shippers into different classes; property may be classified, but shippers of commodities can not be arranged in classes consisting of owners in one class and agents or freight forwarders in another for the purpose of limiting the rights of a common carrier to the hauling of only general commodities tendered

by those classified as agents or freight forwarders; a common carrier can not be limited in transportation of commodities tendered to it only by agents; a common carrier has the legal right, and it is under a legal duty, to contract with and receive general commodities either from the owner thereof, or his agent, and the order of the Commission restricting such common carrier to the receipt of general commodities tendered only by agents, is an illegal, unjustifiable, and arbitrary limitation upon the enjoyment by appellee of its property rights; *New State Ice Co. v. Liebman* (1932), 285 U. S. 262; *Corvington Stock Yards Co. v. Keith* (1890), 139 U. S. 128; such limitation is prohibited by Section 216 (a) and (d), Part II of the Interstate Commerce Act, Section 316, Title 49 U. S. C. A.

On page 39, appellants say that Section 208 (a) authorizes the Commission to make the limitation found in the order complained of; we do not agree with this statement; the only terms, conditions or limitations that can be placed in a certificate are those which "the public convenience and necessity may from time to time require"; appellants make no claim that the public convenience or necessity require any such limitation, and their contention in this regard but further emphasizes the fact that the Commission did not properly apply the law in this case. Even though there could have been a question as to "the convenience and necessity", the Commission was nevertheless mandated by the statute to issue the certificate to appellee "without further proceedings" (Section 206).

A further conclusive evidence of the Commission's improper application of, and utter disregard for, the law, is found in its insistence that *its own order of May 16, 1492, is irrelevant and immaterial in this case*; it wholly ignores



that order, with the result that appellee's property and business will be destroyed; yet it must know that a supplemental order affecting it cannot be made except as provided by law, upon issues properly tendered, notice given, hearing had, and appropriate findings by it warranting such change.

### CONCLUSION

Appellee has the highest regard for the Commission, but it feels that the Commission has acted arbitrarily against it in this proceeding; not with any intent to do it an injury, but through a clear misapprehension and misapplication of the law to undisputed facts; the matter is of extreme importance to appellee, as there is no question but what the enforcement of the void order complained of will destroy its business.

We believe that this Court has no jurisdiction to decide this case upon its merits; but if the Court concludes otherwise, we sincerely urge that the judgment should be affirmed.

Respectfully submitted,

JACOB WEISS,

8 East Market St., No. 512,

ALBERT WARD,

8 East Market St., No. 318,

FERDINAND BORN,

718 Chamber of Commerce Bldg.,

All of Indianapolis, Indiana,

*Attorneys for Appellee.*



FILE COPY  
CLERK - DISTRICT COURT, S. C.  
FILED  
SEP 9 1944  
CHARLES SUMMIT PROPLEY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 449

REGULAR COMMON CARRIERS, CONFERENCE OF  
THE AMERICAN TRUCKING ASSOCIATIONS,  
INC.,

*Appellant,*

*vs.*

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF INDIANA.

STATEMENT AS TO JURISDICTION

B. W. LATOURETTE,  
G. M. REBMAN,  
*Counsel for Appellant.*

HOWELL ELLIS,  
*Of Counsel.*



# INDEX

## SUBJECT INDEX

	Page
Statement as to jurisdiction	1
Statutory provisions	1
Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented	2
Nature of cause and rulings below	2
Cases sustaining the Supreme Court's jurisdiction on appeal	4

## TABLE OF CASES CITED

<i>Alton Railroad Co. v. U. S.</i> , 315 U. S. 15	4
<i>Assigned Car Cases</i> , 274 U. S. 564	4
<i>Board of Trade of Kansas City v. U. S.</i> , 314 U. S. 534	4
<i>Florida v. U. S.</i> , 292 U. S. 1	4
<i>Globe Cartage Co., Inc., Common Carrier Application</i> , No. MC-3339	2
<i>Mississippi Valley Barge Co. v. U. S.</i> , 292 U. S. 282	4
<i>Noble v. U. S.</i> , 319 U. S. 88	4
<i>Tagg Bros. &amp; Moorhead v. U. S.</i> , 280 U. S. 420	4
<i>Texas &amp; Pacific Ry. Co. v. U. S.</i> , 162 U. S. 197	4
<i>Union Stock Yard Co. v. U. S.</i> , 308 U. S. 213	4
<i>United States v. American Sheet &amp; Tin Plate Co.</i> , 301 U. S. 402	4
<i>United States v. Baltimore &amp; Ohio R. R. Co.</i> , 293 U. S. 454	4
<i>United States v. Caroline Freight Carriers Corp.</i> , 315 U. S. 475	4
<i>United States v. Pan American Petroleum Corp.</i> , 304 U. S. 156	4
<i>Virginian Ry. v. U. S.</i> , 272 U. S. 658	4
<i>Wester Paper Maker's Chemical Co. v. U. S.</i> , 271 U. S. 268	4



# STATUTES CITED

## Interstate Commerce Act:

Section 5	3
Section 203	3
Section 204	3
Section 206	3
Section 208	3

## United States Code:

Title 28, Section 41 (28), as amended	2
Title 28, Section 44, as amended	2
Title 28, Section 47	2
Title 28, Section 47a, as amended	1
Title 28, Section 345, as amended	2

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

Civil Action No. 795

HANCOCK TRUCK LINES, INC.,

*vs.*

*Plaintiff,*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Defendants.*

**JURISDICTIONAL STATEMENT BY THE DEFENDANT-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES**

The intervening defendant-appellant, Regular Common Carrier Conference of the American Trucking Associations, Inc., a corporation, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

**A. Statutory Provisions**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41(28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

**B. Date of the Judgment or Decree Sought to be Reviewed and the Date upon which the Application for Appeal was Presented**

The decree sought to be reviewed was entered on May 25, 1944. The petition for appeal was presented and allowed on July 22, 1944, and an assignment of errors filed.

**C. Nature of Cause and of Rulings Below**

This is an appeal from a final decree of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, entered May 25, 1944, declaring illegal and void an order of the Interstate Commerce Commission made August 4, 1943, in *Globe Cartage Co., Inc., Common Carrier Application*, No. NC-3339, as issued, enjoining the enforcement of an integral portion of said order, viz., the portion thereof requiring that the

general commodities to be carried under authority of said order be such as are moving under bills of lading of a freight forwarder. The report made by the entire Commission on reconsideration, found upon substantial evidence that on the "grandfather" date, June 1, 1935, and continuously thereafter, the applicant carried only commodities which were moving upon bills of lading issued by freight forwarders. The Commission's order authorizes the applicant (to which the plaintiff is successor) to operate over certain routes described in said report (which are not in issue in this case) as a common carrier of general commodities which are moving under bills of lading of freight forwarders. A copy of the Commission's said report and order of August 4, 1943, is hereto attached.\*

The plaintiff as successor in interest to the applicant aforesaid in its complaint contended that since the Commission had found the applicant to be a common carrier it could not lawfully specify that the Globe could haul only commodities moving on bills of lading issued by forwarders even though the evidence showed that this was the only kind of operation the Globe carried on during the "grandfather" period. The Court rendered no opinion, but made findings of fact and conclusions of law, a copy of which is attached hereto.

The questions presented by this appeal are substantial. They involve the interpretation and application of sections 5, 203, 204, 206, 208 of the Interstate Commerce Act, relating to the scope of the authority of the Commission to specify the character of common carrier operations carried on under a "grandfather" certificate. The action of the

\* (Clerk's note. The orders of the Commission and opinion of the District Court are printed as an appendix to the Statement as to Jurisdiction in the case of *U. S. et al. v. Hancock Truck Lines, Inc.*, No. 448 October Term, 1944 and are not repeated here.)

court appears contrary to the well-established principle that the operations authorized under a "grandfather" certificate should be such as to assure a substantial parity between applicant's future operations and those carried on bona fide by the applicant on the "grandfather" date and subsequently thereafter.

#### **D. Cases Sustaining the Supreme Court's Jurisdiction on Appeal**

*United States v. Caroline Freight Carriers Corp.*, 315 U. S. 475;

*Alton Railroad Co. v. United States*, 315 U. S. 15;

*Noble v. United States*, 319 U. S. 88;

*Crescent Express Lines v. United States*, 320 U. S. 401;

*Board of Trade of Kansas City v. United States*, 314 U. S. 534;

*Union Stock Yard Co. v. United States*, 308 U. S. 213;

*United States v. Pan American Petroleum Corp.*, 304 U. S. 156;

*United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402;

*United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454;

*Mississippi Valley Barge Co. v. United States*, 292 U. S. 282;

*Florida v. United States*, 292 U. S. 1;

*Tagg Bros. & Moorhead v. United States*, 280 U. S. 420;

*Assigned Car Cases*, 274 U. S. 564;

*Virginian Ry. v. United States*, 272 U. S. 658;

*Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268;

*Texas & Pacific Ry. Co. v. United States*, 162 U. S. 197.



We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated — —, 1944.

B. W. LATOURETTE,  
G. M. REJMAN,  
818 Olive Street,  
St. Louis (1), Missouri,

*Attorneys for Intervening Defendant,  
Regular Common Carrier of the  
American Trucking Associations,  
Inc.*

HOWELL ELLIS,

520 Illinois Building,  
Indianapolis, Indiana,

*Local Counsel for Intervening Defendant.*

(3937)



**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**FEB 9 1945**

**CHARLES ELMORE OROPLIN**  
CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1944.**

**No. 449.**

**REGULAR COMMON CARRIERS CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC.,  
Appellant,**

**vs.**

**HANCOCK TRUCK LINES, INC.**

**Appeal from the District Court of the United States  
for the Southern District of Indiana.**

**BRIEF FOR APPELLANT.**

**B. W. La TOURETTE,  
G. M. REBMAN,  
818 Olive Street,  
St. Louis, Missouri,  
Counsel for Appellant.**

**HOWELL ELLIS,  
520 Illinois Building,  
Indianapolis, Indiana,  
Of Counsel.**



## SUBJECT INDEX.

	Page
I. Reference to official report of opinion below.....	1
II. Grounds upon which jurisdiction of the Supreme Court of the United States is invoked.....	2
III. Statement of the case.....	4
IV. Specification of assigned errors to be urged.....	10
V. Argument.....	13
A. Summary of the argument.....	13
B. Text of argument.....	14
1. The facts sustain the Commission's findings.....	14
2. The Interstate Commerce Commission is empowered to impose restrictions on certificates of public convenience and necessity, limiting a common carrier to the transportation of property moving on bills of lading of freight forwarders.....	19
3. The court below exceeded its jurisdiction.....	27
Conclusion.....	35

### Cases Cited.

Alton R. Company et al. v. United States, 315 U. S. 15, 62 S. Ct. 432, 437.....	19, 21, 34
Charles Bleich, 27 M. C. C. 9 (prior report by Division 5, 14 M. C. C. 662).....	25
Cummings v. Societe Suisse Pour Valeurs de Mataux, 85 Fed. (2d) 287, 289, certiorari denied 306 U. S. 63.....	19
Galveston Truck Lines Corp., 22 M. C. C. 451, 1 c. 467.....	23
Globe Cartage Company, Inc., Common Carrier Application No. MC-3339 (42 M. C. C. 547).....	4, 15, 17



Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc. (38 M. C. C. 382) . . .	5, 15, 17, 18, 19
Mutual Trucking Company Common Carrier Applica- tion, Docket No. MC-3456, decided Nov. 11, 1943 . . .	22
Noble v. United States et al., 319 U. S. 88, 63 S. Ct. 950 . . . . .	23, 24, 26, 27, 29, 33
United States v. Carolina Freight Carriers Corpora- tion, 315 U. S. 475, 62 S. Ct. 722, 726 . . . . .	19, 20, 23, 27, 34
United States v. City and County of San Francisco, 310 U. S. 16, 31 . . . . .	19
Utah Power & Light Co. v. United States, 243 U. S. 389, 409 . . . . .	19

### Statutes Cited.

Constitution of the United States, Fifth Amendment . . .	2, 12
Interstate Commerce Act, Parts I and II, Title 49, U. S. Code . . . . .	2, 3, 16
Motor Carrier Act, 1935 (49 Stat. 543, 49 U. S. C., Sec. 301 et seq., 49 U. S. C. A., Sec. 301 et seq.) . . . . .	2, 4, 16, 18, 19
Statutes sustaining jurisdiction . . . . .	2, 3

# **SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1944.

No. 449.

**REGULAR COMMON CARRIERS CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC.,**

**Appellant,**

**vs.**

**HANCOCK TRUCK LINES, INC.**

Appeal from the District Court of the United States  
for the Southern District of Indiana.

## **BRIEF FOR APPELLANT.**

I.

### **REFERENCE TO OFFICIAL REPORT OF OPINION BELOW.**

No opinion was delivered in the court below. The special findings of fact and conclusions of law filed and the judgment entered in the court below are not officially reported, but are set forth in full in the Transcript of Record (R-65, 74).

II.

**GROUND'S UPON WHICH JURISDICTION OF THE  
SUPREME COURT OF THE UNITED STATES  
IS INVOKED.**

The judgment of the district court was entered May 25, 1944 (R. 74). The petition for appeal (R. 81, 82) was filed July 22, 1944, and the order allowing the appeal (R. 84) was entered the same day. On November 6, 1944, this court noted probable jurisdiction (R. 150). Jurisdiction is conferred on this court by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, section 210 of Judicial Code.

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

This action arises under the Fifth Amendment to the Constitution of the United States and under the law of the United States, 54 Stat. 916, Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49.

Sec. 17 (9), Section 205 (g) of Part II of the Interstate Commerce Act, 49 Stat. 550, 54 Stat. 922, United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Sec. 41 (28), 43-48, 45a and 47a.

The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that this Appellant participated in the proceedings before the Interstate Commerce Commission and is a party in interest therein; that the order of the Commission issued in the said proceedings has been vacated and set aside and the enforcement thereof is permanently enjoined by the findings of the lower Court herein. That by reason thereof Appellant is an aggrieved party within the meaning of Section 47 (a), Title 28, U. S. C.

The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that Section 205 (g), Part II of the Interstate Commerce Act, U. S. C. 49, 305 (g), provides that any final order made by the Interstate Commerce Commission under said Act shall be subject to the same right of relief in Court by any party in interest as is now provided in respect to orders of the said Commission under Section 17 (9) of Part I of the Interstate Commerce Act, 49 U. S. C. 17 (9).

The jurisdiction of the United States is invoked on the further grounds that the judgment of the District Court (R. 74) which granted Appellee's petition (R. 1) for an order to vacate, set aside and permanently enjoin the enforcement of a certain order of the Interstate Commerce Commission entered August 4, 1943, in its Docket No. MC 3339 entitled Globe Cartage Company, Inc., Common Carrier Application (R. 40-50) is illegal, void and contrary to law and thereby adversely affects this Appellant's interest in this cause.

The order of the Interstate Commerce Commission entered August 4, 1943, in its Docket No. MC 3339 entitled Globe Cartage Company, Inc., Common Carrier Application (R. 40-50) is reported at 42 M. C. C. 547.

### III.

#### STATEMENT OF THE CASE.

This is an appeal from the judgment of a three-judge court, which declared illegal and void an order of the Interstate Commerce Commission, made August 4, 1943, in Globe Cartage Company, Inc., Common Carrier Application No. MC-3339 (42 M. C. C. 547) granting Appellee a certificate of public convenience and necessity to operate as a common carrier by motor vehicle under the Motor Carrier Act, 1935 (49 Stat. 543, 49 U. S. C. Sec. 301 et seq., 49 U. S. C. A., Sec. 301 et seq.), now designated as Part II of the Interstate Commerce Act (54 Stat. 919). Appellee filed an application for a certificate of public convenience and necessity as a common carrier under the "grandfather" clause of Section 206(a) of the Act. That section provides that if the common carrier or its predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time", it shall be granted a certificate without more, and Section 208 (a) provides that the Commission "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, to which the common carrier is authorized to operate"; (R. 90, 97). The said application alleged a bona fide operation by Appellee as a common carrier of property by motor vehicle on, prior and subsequent to June 1, 1935, over the routes and between the fixed termini set forth in the said application.



as well as the intermediate and off-route points claimed to be served in that period.

In due course said application was set down for hearing before an Examiner of the Interstate Commerce Commission. After evidence was heard and received and report made to the Commission by the Examiner, the Interstate Commerce Commission, Division 5, did, on the 7th day of October, 1942, order (41 M. C. C. 313) that Globe Cartage Company, Inc., was entitled to continue operations as a common carrier by motor vehicle of general commodities over certain routes between certain fixed termini and to serve certain intermediate and off-route points by reason of having been so engaged on, prior and subsequent to June 1, 1935 (R. 12, 89).

Prior to the order of the Interstate Commerce Commission, Division 5 (R. 12, 89) *supra*, and on May 16, 1942, in a proceeding styled Hancock Truck Lines, Incorporated — Purchase — Globe Cartage Company, Inc. (38 M. C. C. 382), the Interstate Commerce Commission approved the purchase by Hancock Truck Lines, Incorporated, of the common carrier operating rights of Globe Cartage Company, Inc., making the following finding (38 M. C. C. 386):

"We find that purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5 (2) (a) and will be consistent with the public interest, and that, if the transaction is consummated, and pending determination of Globe's 'grandfather' applications in Nos. MC-3339 and MC-3340, Hancock shall be entitled to conduct the common-carrier operations lawfully conducted under the 'grandfather' clause pursuant to those applications, and will be entitled to a certificate covering any 'grandfather' common-carrier rights which may be confirmed as a result of those applications,

which rights are herein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; provided, however, that, if the authority herein granted is exercised, Hancock Truck Lines, Incorporated, shall immediately write off to surplus account the amount properly assignable to its 'Other Intangible Property' account as a result of the transaction. An appropriate order will be entered." (R. 99, 104.)

It will be seen, therefore, that Hancock Truck Lines, Incorporated, was authorized by the Interstate Commerce Commission to acquire any "grandfather" common-carrier rights which may be confirmed in Globe Cartage Company, Inc., and that such acquisition was approved prior to the final determination of the 'grandfather' rights of the latter by the Interstate Commerce Commission. Upon the entry of the order of the Interstate Commerce Commission, Division 5, in Globe Cartage Company, Inc., *supra*, various parties who protested the granting of the said application at the hearing thereon and intervenors who appeared in support of the said protestants, filed with the Interstate Commerce Commission petitions for reconsideration by the Commission en banc of the order (41 M. C. C. 313) of its Division 5, said petitions being described as follows:

Petition of Railroad Protestants in Central Freight Association Territory, Official Classification Territory, Southern Freight Association Territory, Southwestern Territory (R. 105).

Petition of the Cleveland, Columbus & Cincinnati Highway, Inc., Motor Express, Inc., and Motor Express, Inc., of Indiana (R. 107).

Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc. (R. 120).

Globe Cartage Company, Inc., filed its replies to all of the above described petitions (R. 115, 125).

The Commission en banc after consideration of the said petitions hereinabove referred to entered its order (42, M. C. C. 547) on the 4th day of August, 1943 (R. 40) modifying the order of its Division 5 (R. 12, 89), supra, in the following respects:

Whereas the order of the Interstate Commerce Commission, Division 5, supra, had not made any limitation as to the type of carriage to be performed by Globe Cartage Company, Inc., as a common carrier, the Commission en banc ordered that the said company was entitled to a certificate of public convenience and necessity authorizing operations as a

"common carrier of general commodities except commodities in bulk, and those of unusual length, width or weight which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior reports."

On October 29, 1943 Hancock Truck Lines, Inc., successor in interest to Globe Cartage Company, Inc., by reason of the aforesaid purchase of the latter's operating rights filed its "Petition for Reconsideration and Brief in Support Thereof" (R. 127) in which said petition the said Hancock Truck Lines states:

"Applicant requests said reconsideration in the following respects only, and for the following reasons:

"The Commission erred, in denying the grant of the use of all of the operating routes to applicant, and, in denying applicant the right to serve all of the points and places as applied for in its 'Grandfather' application and, by granting only a portion of such applied for operating routes, points and places" (R. 127).

In its Petition for Reconsideration by the Commission en banc of the order of its Division 5, Hancock Truck

Lines, Inc., did not complain against the restriction that would limit its service to the transportation of property moving on bills of lading of freight forwarders. We say this for the reason that in the said petition, the following language appears:

"We do not challenge, nor do we complain against, the restrictions to serve only freight forwarders. We give up our claims to serve others, painful as this limitation is (R. 129). Our assumption during the 'Grandfather' period was to transport for freight forwarders" (R. 130).

It is as the result of the order of the Interstate Commerce Commission denying reconsideration of the order (42 M. C. C. 547) and denying a further postponement of the effective date thereof as prayed by Hancock Truck Lines, Inc., that the said Hancock Truck Lines, Inc., brings this case into Court on plaintiff's petition (R. 1). The transcript of testimony taken before the Interstate Commerce Commission's Examiner on hearing was not introduced in evidence before the lower court. However, the order (41 M. C. C. 313) of the Interstate Commerce Commission, Division 5 (R. 12), makes the following finding of fact:

"Applicant was incorporated under the laws of Indiana, in 1931. It has been engaged in the transportation of freight for the Universal Carloading & Distributing Company, hereinafter called Universal, under written contracts since prior to June 1, 1935. In addition to serving Universal, it also claims to have been operating for other shippers, under contract, transporting such commodities as magazines (packed in mail bags), leather, printed matter, paper, bottles, and alcoholic beverages. The names of the persons for whom such operations are claimed to have been performed were not disclosed, and no showing was made as to the extent of such service, the time when it was begun, the points served, the frequency of the



service, or the arrangements under which the operations were conducted. In addition, we observe that, out of several thousand trips shown of record both prior and subsequent to June 1, 1935, not one relates to service other than that performed for Universal. The burden of proof in support of a claim of an operating right under the 'grandfather' clauses of sections 206 (a) and 209 (a) of the act rests upon applicant both as to the character and scope of its operations, both on and since the respective statutory dates. On the present records, we must conclude that applicant has failed to establish that it has served any shippers other than Universal" (R. 13).

The above finding of fact by the Interstate Commerce Commission, as well as the "Petition for Reconsideration in Behalf of Hancock Truck Lines, Inc." (R. 127), in which the latter makes no complaint against the restriction to serve only freight forwarders clearly indicates that on, prior and subsequent to June 1, 1935 Globe Cartage Company, Inc., as predecessor in interest to Hancock Truck Lines, Inc., was engaged solely in the transportation of general commodities moving on bills of lading of freight forwarders.



IV.

**SPECIFICATION OF ASSIGNED ERRORS  
TO BE URGED.**

The appellant will urge the following assigned errors specified both in its assignment of errors and in its statement of points to be relied upon (R. 146, 147):

The United States District Court for the Southern District of Indiana erred:

1. In not dismissing plaintiff's complaint.
2. In setting aside and enjoining the Commission's order of August 4, 1943.
3. In making and entering findings of fact and conclusion of law in the form and substance adopted by the Court.
4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants.
5. In making and entering its order of injunction dated May 26, 1944, holding that that part of the Commission's order which confines authorized operations by Hancock Truck Lines, Inc., as successor in interest of Globe Cartage Company, Inc., to commodities "which are at the time moving on bills of lading of freight forwarders" is illegal and void, and enjoining enforcement of the same.
6. In holding, as indicated in the Court's finding of fact No. 19, that the report and order of the Commission as issued August 4, 1943, are not supported by the facts found in said report; that said order is discriminatory against the plaintiff; or that it in any way unlawfully restricts plaintiff in the performance of its public duties.
7. In failing to find that the evidence supports the Commission's findings that during the "grandfather" period

the Globe Cartage Company, Inc., served only a freight forwarder and carried only goods which were moving on bills of lading issued by a forwarder.

8. In giving consideration, as the basis of its decree of May 25, 1944, to the history and characteristics of the plaintiff Hancock Truck Lines, Inc., and its operations, and to the statements and conclusions of Division 5 in its report of May 16, 1942, in MC-F-1743, approving the purchase of the Globe by the Hancock, as indicated in the Court's findings of fact as a whole, and particularly in findings Nos. 3, 14, 15, 16, 17 and 18.

9. In holding, as indicated by the Court's finding of fact No. 19, that the Commission's order imposed a limitation which could not be sustained in the absence of a finding by the Commission under Section 208 of the Interstate Commerce Act that such limitation was a reasonable limitation required by the public convenience and necessity.

10. In failing to hold that the Commission's order as issued was authorized under that portion of Section 208 of the Interstate Commerce Act which requires the Commission to "specify the service to be rendered" in a certificate issued under Section 206 of that Act.

11. In holding, contrary to the Commission's decision, that the restriction imposed by the Commission was inconsistent with Globe's common carrier status.

12. In failing to hold that the Commission was authorized to issue a certificate to a common carrier limited, in accordance with Section 203 (14), to the transportation of a particular class of property, viz., property moving on bills of lading of freight forwarders, that being the only class of commodities which the Commission found was being transported by applicant during the "grandfather" period.

13. In weighing the evidence heard by the Commission and making statements of fact in its findings of fact based thereon, instead of limiting its consideration to the question of whether the Commission record contains substantial evidence to sustain the Commission's report and order.

14. In attempting to permit the plaintiff to exercise operating authority other than that issued by the Commission,—authority which would authorize the plaintiff, as successor to the Globe, to perform operations different from those the Commission has found that the Globe was performing on and subsequent to June 1, 1935, the "grandfather" date.

15. In setting aside only the commodity restriction while leaving the rest of the order in effect, and thereby undertaking to exercise the administrative function entrusted to the Commission of determining in the first instance the scope of the operating authority to be issued; instead of setting aside the order as a whole and remanding the case to the Commission for further proceedings, which would have been the proper procedure in case the commodity restriction contained in the order were held to be invalid.

16. In failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree.

17. In making the Court's finding of fact No. 2, which states, among other things, that plaintiff's action arose under the Fifth Amendment to the Constitution of the United States.

V.

**ARGUMENT.**

A.

**SUMMARY OF THE ARGUMENT.**

The Argument of appellant is directed to the assigned errors which are in turn directed to the conclusions of law and findings of fact of the Court below.

1. The facts of record before the Interstate Commerce Commission in the matter of the Application of Globe Cartage Company, Docket No. MC-3339, fully sustains the findings made and the order entered by the Interstate Commerce Commission in said matter, which said order is the subject of complaint in Plaintiff-Appellee's petition.

2. The findings and order of Division 4 of the Interstate Commerce Commission in Interstate Commerce Commission Docket No. MC-F-1743, being the acquisition matter wherein plaintiff acquired the operating rights of Globe Cartage Company were not conclusive and binding upon the Interstate Commerce Commission in its determination of the Globe Cartage operating rights, and such findings and order of the Interstate Commerce Commission in its Docket No. MC-F-1743, could not in law constitute a determination of the "grandfather rights" which plaintiff acquired by its purchase of Globe Cartage Company.

(a) Findings and orders of Division 4 of the Interstate Commerce Commission are entered pursuant to Section 5 of the Interstate Commerce Act and determine solely the question whether a transfer of operating rights is consistent with the public interest, whereas the determination of "grandfather rights" is made pursuant to the provisions of Section 206 (a) of the Interstate Commerce Act.



(b) Estoppel cannot be asserted as a defense against either the United States or the Interstate Commerce Commission.

3. The Interstate Commerce Commission has the authority, pursuant to the provisions of Part II of the Interstate Commerce Act, to issue a Certificate of Public Convenience and Necessity imposing or placing thereon in a proper case restrictions that limit the carrier to the transportation of "general commodities which are at the time moving on bills of lading of freight forwarders."

(a) The placing of such limitation or restriction on the certificate in the instant case is not a denial of due process of law.

(b) Such restriction is not inconsistent with plaintiff's status as a common carrier.

(c) Plaintiff could not acquire by purchase any greater operating authority than its predecessor was entitled to.

4. The court below exceeded its jurisdiction in substituting its judgment for that of the Interstate Commerce Commission in its findings and order in that

(a) Said Court did not remand said matter to the Interstate Commerce Commission for further proceedings.

(b) Said Court made findings of fact and conclusions of law contrary to the record made before the Interstate Commerce Commission.

B.

#### TEXT OF ARGUMENT.

##### **The Facts Sustain the Commission's Findings.**

We need not treat of this assignment at length as Appellee does not question the sufficiency of the evidence on which the Commission based its findings nor the findings themselves. Appellee has conceded in its "Petition for



Reconsideration" filed with the Interstate Commerce Commission on November 1, 1943 (R. 127), that the said findings are supported by the evidence. We say this in view of the statement by Appellee in its said petition which is as follows:

"We do not challenge, nor do we complain against, the restriction to serve only freight forwarders. We give up our claims to serve others, painful as this limitation is (R. 129). Our assumption during the 'Grandfather' period was to transport for freight forwarders" (R. 130).

The findings and order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, are not determinative of the operating rights of Globe Cartage Company, Inc., or its successor in interest, Hancock Truck Lines, Inc. Appellee has contended in the Court below that the order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, approving the acquisition by Hancock Truck Lines, Incorporated, of the operating rights of Globe Cartage Company, Inc., and the authorization for unification of the rights of both now estops the Interstate Commerce Commission from restricting the operations of Globe Cartage Company, Inc., to the transportation of property "moving on bills of lading of freight forwarders." It is further contended by Appellee that the order (38 M. C. C. 382) of the Interstate Commerce Commission, Division 4, should not have been entered approving the purchase by Hancock Truck Lines, Inc., of the operating rights of Globe Cartage Company, Inc., if the Interstate Commerce Commission in the future intended to place a restriction such as that here in issue, upon the operating rights of the latter. That since the Commission has ordered and approved the said purchase and the unification of the operating rights of both companies, it must now order a certificate issued to Hancock Truck Lines, Inc., which would reflect other than a

substantial parity between the future operations by Hancock Truck Lines, Inc., and the prior bona fide operations of Globe Cartage Company, Inc. In acting upon the application by Hancock Truck Lines, Inc., to purchase the operating rights thereafter to be determined, of Globe Cartage Company, Inc., the Commission proceeded under Section 5 of Part I of the Interstate Commerce Act [28 U. S. C., Sec. 305 (2) (a)] which has to do with unifications, mergers and acquisitions of control of motor carriers. This section of the Act has no relation to the determination of operating rights of a motor carrier. Under it the Commission has jurisdiction only to review the terms and conditions of the "proposed unification, merger, acquisition and control" and

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."

The power of the Interstate Commerce Commission to determine "grandfather" rights of a motor carrier is vested in it under Section 206 (a) of the Motor Carrier Act, 1935, now designated as Part II of the Interstate Commerce Act. It is under the latter section of the Act that the operating rights of Globe Cartage Company, Inc., must be determined. In administering the two sections of the Act aforesaid, the Interstate Commerce Commission has pursuant to law organized itself into divisions, Division No. 4 treating of applications filed under the first named section and Division No. 5 treating of applications filed under the second named section. To illustrate the separate powers of the Commission under the sections of the act aforesaid, we call attention to the language of the

Interstate Commerce Commission in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 386, in which it is said that Hancock Truck Lines, Incorporated, "will be entitled to a certificate covering any 'grandfather' common carrier rights which may be confirmed as a result of those applications" (R. 104). The Interstate Commerce Commission was there discussing the applications of Globe Cartage Company, Inc., Nos. MC 3339 and MC 3340 which have been the subject of orders of the Commission, 41 M. C. C. 313, 42 M. C. C. 547. The Interstate Commerce Commission did not hold out to appellee that the approval of the purchase aforesaid in any manner extended the scope of the "grandfather" rights of Globe Cartage Company, Inc. It was merely found that the said purchase would be "consistent with the public interest" and that the rights of the two companies might be unified. The Commission in that case went on further to say "the nature and extent of the service which Hancock may render in conducting operations under the unified rights must be governed by the existing rights as confirmed and lawfully claimed" (R. 103). Throughout its order, Division 4 continually put the parties on notice that it was treating only of the claimed rights of Globe Cartage Company, Inc., as a common carrier under the "grandfather" clause. For example, the Division 4 report further states:

"In No. MC-3339, it claims rights as a common carrier, serving all intermediate points, over routes, in territory bounded on the east by Buffalo, N. Y., and Pittsburgh, Pa., on the south by Wheeling, W. Va., Columbus and Cincinnati, Ohio, Louisville, and Evansville, on the west by St. Louis, and Peoria, Ill., and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pa.; and in No. MC 3340 it claims rights as a contract carrier for Universal Carloading & Distributing Company, a forwarding company, between the same points and over the identical routes. For the purpose of this proceeding, only the operations of

Globe as a common carrier will be considered, and our findings will authorize purchase only of its rights to operate as a common carrier. Hemingway Bros. Interstate T. Co.—Purchase—Finkel Motor, 15 M. C. C. 702" (R. 101).

In its administration of the provisions of the Interstate Commerce Act affecting motor carriers, the Interstate Commerce Commission was faced with the necessity of receiving and determining applications filed under the provisions of former Section 213\* of the Motor Carrier Act, 1935, and present Section 5 of Part I of the Interstate Commerce Act prior to the final determination of the scope of the "grandfather" rights sought to be acquired. Obviously the Commission could not under these circumstances determine any other question than whether the acquisitions of claimed rights would be consistent with the public interest. It is clear that there is no merit to the contention of Appellee that the acquisition by Hancock Truck Lines, Inc., of the claimed operating rights of Globe Cartage Company, Inc., affected in any manner the scope of operating rights of the latter as a common carrier.

#### **Estoppel Cannot Be Asserted Against the Commission.**

Appellee contends the Commission is estopped from limiting its service to the transportation of property moving on bills of lading of freight forwarders by reason of its order entered in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 382. Appellee has been sustained in its contention by the lower court in its findings Nos. 12, 13, 14, 15, 16, 17 and 18. (R. 69, 70, 71, 72).

The record before the Commission is devoid of any evidence proving or tending to prove that either of the de

\*Repealed by Public Act No. 785, 76th Congress, Section 21 (e), approved September 18, 1940 (Transportation Act, 1940).



defendants United States of America or the Interstate Commerce Commission was guilty of estoppel by reason of the orders entered in the instant case or in Hancock Truck Lines, Incorporated—Purchase—Globe Cartage Company, Inc., 38 M. C. C. 382. Further, we submit that such contention may not be urged against either of the defendants as a matter of law. *Cummings v. Societe Suisse Pour Valeurs de Mataux*, 85 Fed. (2d) 287, 289, certiorari denied 306 U. S. 63; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409; *United States v. City and County of San Francisco*, 310 U. S. 16, 31.

**The Interstate Commerce Commission Is Empowered to Impose Restrictions on Certificates of Public Conveniences and Necessity Limiting a Common Carrier to the Transportation of Property Moving on Bills of Lading of Freight Forwarders.**

We come now to the substantial question presented by this appeal, that is, the power of the Commission to limit or restrict the operations of a common carrier to the transportation of freight moving on bills of lading of freight forwarders. On behalf of Appellee it is contended that such restriction is void as being in conflict with the terms of Section 208 of the Motor Carrier Act, 1935 (Title 49, U. S. C. A. 308). Appellant vigorously urges that the Commission under said section of the Act is not only empowered, but it is directed by Congress to limit or restrict Certificates of Public Convenience and Necessity issued to common carriers so as to accurately reflect the operations of said carriers conducted on and prior to June 1, 1935. This Court has held that the Commission is so empowered in *Alton R. Company et al. v. United States*, 315 U. S. 15, 62 S. Ct. 432, 437, and *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 62 S. Ct. 722, 726. In the latter case this Court said:



"As we indicated in *Alton R. Company v. United States*, supra, the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity' between future operations and prior bona fide operations (315 U. S. 22, 62 S. Ct. 437, 86 L. Ed. ....)."

The test here then is whether the Commission's order results in a "substantial parity between future operations and prior bona fide operations" conducted by Globe Cartage Company, Inc. As we have heretofore said, Appellee has without question admitted, and we think will not now seriously contend otherwise, that the operations of Globe Cartage Company were confined solely to the transportation of property moving on bills of lading of freight forwarders. While we have heretofore pointed out, this fact in our first assignment, we will, in view of the importance of the question involved, reiterate admissions made by Appellee during the various stages of the proceedings before the Commission. The "Petition for Reconsideration" filed with the Commission by Appellee (R. 127, 129) indicates that it entirely waived the question of the restriction about which it now complains, saying:

"We do not challenge, nor do we complain against, the restriction to serve only freight forwarders."

Again in the same petition Appellee, speaking of the restrictions and limitations imposed by the Commission in the Certificate of Public Convenience and Necessity authorized to be issued, said:

"At every point and place claimed, our trucks were made available for transportation at all times. The delineated analysis of the proof in the Division 5 Report of August 4, 1943, indicates this beyond doubt. Point by point, city by city, that Report, beginning with the last paragraph on the bottom of sheet 5 thereof and continuing through the third paragraph on sheet 9, proclaims loudly that, measured—by what

freight forwarders made available for transportation—we transported. This, notwithstanding freight forwarders, did not always maintain a flow of traffic for us to transport at each point or between each point every day, or every week, or even every month.

"When they did have traffic for us to transport even with breaks in between of half a year or even a year, we were 'Johnny on the spot,' and we carried out our burden and we did transport According to Our Holding Out.

"It is in this light that our proof must be assayed. Our assumption during the 'Grandfather' period was to transport for freight forwarders" (R. 130).

There can be no question therefore as to the character of the transportation service performed on and prior to June 1, 1935, by Globe Cartage Company, being that of transporting exclusively property which moved on bills of lading of freight forwarders, and that its holding out was so limited. This being true the Commission rightly provided for a restriction accordingly, which said restriction results in the establishment of "substantial parity between future operations and prior bona fide operations." *Alton R. Company v. United States, supra.*

Appellee contends, however, that the maintenance of such "substantial parity" in this case is unlawful and irregular; that the Commission exceeded its powers, this despite the fact that without such restriction appellee's operation would be enlarged and expanded without proof of "public convenience and necessity," and without regard for its own self-imposed restriction.

Appellant respectfully submits that Section 208 (a) of the Motor Carrier Act, 1935, as amended, requires that any certificate issued pursuant to an application filed under the provisions of Section 206 (a) of the said Act must "specify the service to be rendered." Thus the Commission is, under this provision of the Act, empowered and required by Congress to place a restriction in any certificate to be

issued to Appellee, which said restriction shall reflect the type of service rendered on or prior to June 1, 1935. In view of the type of carriage performed by Appellee, the Commission must pursuant to the mandate of Congress limit the Certificate of Public Convenience and Necessity to be issued in the instant case so that Appellee will be confined to the transportation of property moving on the bills of lading of freight forwarders. The limitation ordered to be placed in Appellee's Certificate of Convenience and Necessity is not one limiting the transportation service to be performed to a specified shipper or shippers. Rather the limitation defines or specifies the type of service to be rendered in the same manner as the Commission has in other cases limited a common carrier to the transportation of particular commodities, illustrations of which may be the limitation of Certificates of common carriers to the transportation of petroleum products, livestock or household goods. Since its order in the *Globe Cartage Company, Inc.*, case, *supra*, the Commission, Division 5, has entered an order in *Mutual Trucking Company Common Carrier Application*, Docket No. MC 3456, decided November 11, 1943.\* In that case the Commission restricted the Certificate ordered to be issued to the carriers involved to the transportation of property moving on bills of lading of freight forwarders. At Sheet 6 of its report in that case, the Commission cited with approval its order in *Globe Cartage Company, Inc.*, *supra*, saying:

"For reasons stated in *Globe Cartage Company, Inc., Common Carrier Application*, ... M. C. C. ... (decided August 4, 1943), the authority granted herein will authorize operations as a common carrier by motor vehicle of general commodities which are at the time moving on bills of lading of freight forwarders."

\*This report also embraces No. MC-3456 (Sub-No. 2), *Mutual Trucking Company Extension—Bridgeport, Conn.*; No. MC-3455, *Mutual Trucking Company Contract Carrier Application*; No. MC-13900, *Midwest Haulers, Inc., Common Carrier Application*, and No. MC-13900 (Sub-No. 2), *Midwest Haulers, Inc., Extension—Baltimore*. This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

The said order has become a final order of the Commission. Throughout its administration of the Act, the Commission has exercised its power to impose restrictions and limitations in Certificates of Public Convenience and Necessity issued to motor carriers. As illustrations of the exercise of this power, the following cases are typical.

In *Galveston Truck Lines Corp.*, 22 M. C. C. 451, l. c. 467, the Commission said:

"The evidence shows, however, that applicant sought to select its shippers and traffic and only accepted such traffic as it considered desirable, refusing, it is stated, more than was accepted. Although the volume of business which a shipper could offer was an important consideration, it appears that the type of traffic also was given consideration by applicant in the acceptance of a shipper's account. We conclude that applicant's discriminating policy has had a definite effect upon the variety of commodities transported, and should be given consideration in our determination of this issue."

The above language in *Galveston Truck Lines Corp.*, supra, is cited with approval by this Court in *United States v. Carolina Freight Carriers Corp.*, supra, l. c. 483. The provisions of Section 208 of the Motor Carrier Act, 1935, as amended, which require that any certificates issued under Sections 206 or 207 thereof shall "specify the service to be rendered" are comparable to the provisions of Section 209 (b) of the Act wherein it is provided with reference to the issuance of permits to contract carriers by motor vehicle that "the Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof."

In *Noble v. United States et al.*, 319 U. S. 88, 63 S. Ct. 950, this Court reviewed an order issued by the Interstate Commerce Commission restricting a permit issued the car-



rier there involved so as to limit its transportation service to that "under individual contracts" with persons who "operate food canneries or meat packing business." This Court sustained the Commission's order holding that the Commission was empowered to place restrictions in a permit of the nature involved, saying at 319 U. S., 1, c. 91, 92, 63 S. Ct. 952:

"An accurate description of the 'business' of a particular contract carrier and the 'scope' of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type of class of shippers served. Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he has carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act (*Alton R. Co. v. United States*, 315 U. S. 15, 22, 62 S. Ct. 432, 436, 86 L. Ed. 586) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—



a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See Sec. 206 (a), Sec. 207, and Sec. 209 (b)."

Unless the Commission be empowered to place restrictions and limitations in Appellee's Certificate, it would reflect an operation entirely different than that conducted on and prior to June 1, 1935 and thereby Appellee's prior activities would be greatly distorted.

Appellee contends that the restriction here imposed does violence to the term "common carrier." Such is not the case. The peculiar nature of the business of a freight forwarder was discussed by the Commission en banc in Charles Bleich, 27 M. C. C. 9 (prior report by Division 5, 14 M. C. C. 662). At pages 15 and 16 of its decision in that case, the Commission said:

"The forwarder is not like an ordinary shipper who tenders its own goods to a carrier for transportation. It merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers or consignees that it will undertake to have the same transported to ultimate destinations. Its primary characteristic is that of a carrier, and only as an incident to its common-carrier obligation does it assume the apparent status of a shipper, much the same as any common carrier by motor vehicle which accepts a piece of freight for delivery beyond its terminus and forwards the same over the line of a connecting carrier thereby becomes a shipper as to that particular transportation."

Through its service to freight forwarders, Appellee is transporting property tendered by the general public to

the freight forwarder for transportation. It is entirely consistent therefore that the Commission determine in this case that applicant may be limited to the transportation of property moving on bills of lading of freight forwarders, and at the same time have the status of a common carrier. Congress has in fact affirmed by statutory enactment the findings of the Commission that common carriers who on the critical date were engaged solely in transporting property moving on bills of lading of freight forwarders should be limited to that type of operation in the future by recognizing such transportation as a special and individual class of service similar to the service by common carriers in the transportation of petroleum products, household goods, livestock and other traffic of that type. In 49 U. S. C. 1018, Section 418, Part IV, of the Interstate Commerce Act, Congress has provided that:

"It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this chapter and chapters 1, 8, and 12 of this title;"

Appellee does not contend that the standard by which its operations were judged was improper. We submit that the Commission in its order in this case applied the proper statutory standard in defining the nature of appellee's business and its scope. Since this is the case, this Court will not disturb that finding. As was said in *Noble v. United States et al.*, supra, 319 U. S., 1. c. 92, 93, 63 S. Ct. 952:

"Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope, our function is at an end. The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been re-

served for the Commission. *United States v. Maher*, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162; *Alton R. Co. v. United States*, supra; *United States v. Carolina Freight Carriers Corp.*, supra."

This Court has consistently recognized that the Commission is a body of experts whose judgment on the intricacies of transportation problems is to be given great weight. As was said in *United States v. Carolina Freight Carriers Corp.*, 315 U. S., l. c. 489, 490, 62 S. Ct., l. c. 730:

"We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence, but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States v. Maher*, supra; *Alton R. Co. v. United States*, supra. Our task ends if the statutory standards have been properly applied."

The Commission having exercised its power "to specify the service" to be performed by Appellee pursuant to the mandate of Congress, the Court should not disturb that finding. In view of what has been said, it will be apparent that Appellee has not been deprived of its property without due process of law.

#### **The Court Below Exceeded Its Jurisdiction.**

As pointed out above in the last-quoted language in the case of *Noble v. United States et al.*, supra, this Court is limited in its consideration of this case to a determination of the question as to whether or not a correct statutory standard was applied by the Commission in the issuance of its order. We submit that the standard as applied was that prescribed by the statute.

Appellee's complaint (R. 11) before the Court below attacked the order of the Commission en banc (R. 40-50, Ex. B, R. 89-90) on the following grounds:

(1) That that part of the final order of the Commission which restricts Appellee to the transportation of freight moving on bills of lading of freight forwarders is illegal and void as exceeding the powers of the Commission:

(a) Because the Commission had found that appellee, Hancock Truck Lines, Inc. (successor in interest to Globe Cartage Company, Inc.), was a common carrier by motor vehicle on June 1, 1935, and continuously since said date.

(b) Because the restriction imposed and complained of is an unlawful and illegal restriction, not authorized by law and will deprive appellee (plaintiff below) of its property without due process of law.

(c) Because the restriction is a violation of Sec. 206 of the Motor Carrier Act.

As previously indicated in our brief the record made before the Commission in the instant case was not introduced in evidence before the lower court. That Court had before it the various pleadings filed and the Report and Order of the Commission, Division 5, in Docket No. MC-3339, October 7, 1942 (R. 12-40) and the Order of the Commission en banc on Reconsideration August 4, 1943 (R. 40-50), which last mentioned order is the order complained of. Beyond the two orders referred to, the Court was in no wise furnished with proof that the Commission's findings and order were not substantiated by evidence of record. In truth and in fact, the order of the Commission en banc (R. 40-50, Ex. B, R. 90, 91) definitely recites and finds as a fact that Globe has "transported only traffic tendered to it by the Universal Carloading Company," a freight forwarder. The order then recites the reasons for imposing the restriction or limitation.

As pointed out elsewhere in our brief, Appellee in its Petition for Reconsideration (R. 127-144, Ex. 6, R. 98), filed on November 1, 1943, attacking the order of the Commission en banc (R. 40-50, Ex. B, R. 90, 91) has admitted



that its only holding out, its only service performed was "to transport for freight forwarders."

With only the above orders before it, with no proof or evidence tending to prove that Appellee (plaintiff below) ever held itself out or transported for the general public, and with the admissions of the Appellee, all as its sole guide, the Court below sought to substitute its judgment for that of the Commission in contravention of the express mandate of this Court in the cases *Noble v. United States*, *supra*, and *United States v. Carolina Freight Carriers Corporation*, *supra*, by making its findings of fact and conclusions of law (R. 65-73) and entering its order (R. 74) thereon.

The Court below erred and exceeded its jurisdiction in the following, among other respects:

- (1) The Court failed in its Findings Nos. 5 and 6, to note that Division No. 5 of the Interstate Commerce Commission found that "applicant has failed to establish that it has served any shippers other than Universal" (Universal Carloading and Distributing Company, a freight forwarder.)
- (2) The Court failed in its Finding No. 9, to refer to the finding by the Commission en banc, in its order of August 4, 1943 (R. 40-50, Ex. B, R. 90), that Globe has "transported only traffic tendered it by the Universal Carloading & Distributing Company."
- (3) The Court failing to consider the findings of the Commission en banc, *supra*, erroneously stated in its Finding No. 10 that "contrary to the findings" set out in Finding No. 9 of the Court below, the Commission placed certain restriction in its order of August 4, 1943 (R. 50-50, Ex. B, R. 90). The Court below exceeded its jurisdiction in this instance for:
  - (a) It infringed upon the right reserved to the Commission alone in weighing and considering evi-



dence and with no evidence whatsoever before, it the Court has arbitrarily, capriciously and without reason, attempted to make a finding of fact wholly unwarranted by the record before it.

(b) The Court below has substituted its judgment for that "expert judgment" of the Commission respecting the character and nature of the relationship which obtains between a freight forwarder and a common carrier.

(4) The Court below has exceeded its jurisdiction in classifying freight forwarders as shippers, contrary to the express findings of the Commission in its order of August 4, 1943 (R. 40-50; Ex. B, R. 90), and contrary to the classification and definition of Congress in Part IV of the Interstate Commerce Act, 49 U. S. C. 1001-1022.

(5) The Court below was in error and exceeded its jurisdiction in its Finding No. 14, in failing to distinguish between the rights which Appellee (plaintiff below) acquired by virtue of its acquisition of Globe Cartage Company, Inc., and the rights which it, the Appellee, had by virtue of its own operations.

(6) The Court below further erred and exceeded its jurisdiction in each and every particular of its Finding No. 14 (R. 70), as there was no evidence of record proving or tending to prove any of the matters set out in said Finding No. 14.

(7) The Court below erred and exceeded its jurisdiction in making its Findings Nos. 15, 16, 17 and 18 (R. 70, 71, 72) and in giving consideration to the matters and things therein set out, for:

(1) The matters therein set out were not in issue in this cause, the sole issue being the matter of restriction placed upon the certificate issued Appellee under the claimed "grandfather" rights of Globe Cartage Company.

(2) The Court sought to substitute its judgment for that of Congress, in that it sought to apply a different standard than that set up by Congress to determine the scope of a certificate issued under the "grandfather" clause of the Act, as is evidenced by the statements in its Finding No. 18 (R. 72), wherein appears the following language:

"If that part of the order complained of by the plaintiff is enforced, all of the business which plaintiff has built up under said unification order of May 16, 1942, will be destroyed, and plaintiff will be put back to the position which Globe was in when said order was entered."

The Court in the said finding No. 18 erroneously reasons that although Globe Cartage Company transported for freight forwarders only, that nevertheless the acquisition of its rights by Hancock Truck Lines, Inc., which carrier served the general public, resulted in an enlargement of the rights of the former.

(8) The Court erred and exceeded its jurisdiction in its Finding No. 19 (R. 73), wherein it recited that:

"The Commission has made no finding of fact that the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it will be consistent with the public interest to place such restriction in said order; nor has it found that good cause exists for changing said order of May 16, 1942."

"That part of the order complained of herein is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support; said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general

commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void."

for the Court:

(a) Substituted its judgment for that of the Commission in ignoring the fact of record that Globe has transported only freight tendered it by Universal Carloading & Distributing Company as above set out.

(b) States that the Commission made no findings that the restriction complained of is a reasonable term required by the public convenience and necessity, thereby completely failing to consider the nature of the Globe operation as the record before the Court disclosed such operation to have been.

(c) Applies the wrong standard when it refers to the failure of the Commission to find as a fact that the restriction will be consistent with the public interest, such standard not being applicable to a common carrier seeking a certificate under the "Grandfather" clause of the Act.

(d) Confuses the nature of the Division 5 order of May 16, 1942 (R. 99, Ex. F, R. 91), with the order of the Commission en banc (R. 40-50, Ex. B, R. 90), and erroneously assumes as a finding of fact that said order of May 16, 1942, was determinative of the "Grandfather" rights of Globe.

(e) Completely ignores the admissions of plaintiff and the finding of the Commission en banc (R. 40-50, Ex. B, R. 90) that Globe merely held itself out and did only transport freight moving on freight forwarders' bills of lading, and states that that part of the order complained of is not sustained or justified by any fact found by the Commission, and there is no rational basis for its support.

(f) Without assignment of reason, and contrary to all of the evidence before it, states not that the restriction in any case is void, or illegal, but that as to plaintiff "said part of said order is now found to be discriminatory against the plaintiff, is an arbitrary, un-

reasonable and capricious restriction upon the rights, duties and privileges of plaintiff as a common carrier of general commodities by motor vehicle for compensation, will deprive plaintiff of its rights and property without due process of law, and is illegal and void."

(9) The Court below erred and exceeded its jurisdiction in that the Court, on the sole basis of the foregoing erroneous, unwarranted and unfounded findings of facts, concluded the law to be:

"That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those 'which are at the time moving on bills of freight forwarders' is illegal and void, and the defendants should be permanently enjoined from enforcing same" (R. 73).

Pursuant to the above conclusion of law, the Court below entered its decree (R. 74).

We submit on behalf of appellant that the Court in entering the above conclusion of law and its decree thereon exceeded its jurisdiction and was in error for

(a) If it found as a fact that that part of the order complained of herein is not sustained by the record made before the Commission (which fact is specifically denied), it should have set aside the Commission's order and remanded the cause to the Commission for further proceedings.

The Court below was not empowered to make findings of fact as to matters which Congress has committed to the sole jurisdiction of the Commission.

The Court below acted in direct contravention to the decision of this Court in the case of *Noble v. United States*, supra.

\*Emphasis ours.



(b) The Court below in presuming and arrogating to itself the field of jurisdiction reserved solely to the Commission, has declared as a matter of law that the restriction imposed on the Globe Certificate is void and illegal. In so declaring it has set forth no reason except that the Commission has failed to find certain facts.

The Court below has failed to determine the sole and only issue in the case and that is:

That the Commission is empowered and mandated by Congress to "specify the type of service to be rendered" by common carriers, pursuant to the provisions of Sec. 208 (a) of the Act, 49 U. S. C. 308a.

The Court below has exceeded its jurisdiction in attempting to exercise a jurisdiction reposed in the Commission. In so doing, it has incorrectly applied the standard established by Congress in Sec. 206a of the Act, 49 U. S. C. 306 (a) for measuring "grandfather" rights of common carriers. The Court has in effect declared the standard so established to be null and void as depriving plaintiff of property without due process of law. The Court has overruled the Supreme Court in its holding that the "Grandfather" clause seeks to establish a substantial parity between operations conducted on June 1, 1935 and subsequent thereto. *Alton R. v. United States*, supra; *United States v. Carolina Freight Carriers Corp.*, supra.



For all of the reasons hereinabove stated, assigned and set out, we submit that the order of the Court below should be vacated, the injunction against the United States and the Interstate Commerce Commission should be dissolved, and that the order of the Commission en banc be affirmed.

Respectfully submitted,

B. W. La TOURETTE,

G. M. REBMAN,

818 Olive Street,

St. Louis, Missouri,

Attorneys for Regular Common  
Carrier Conference of the  
American Trucking Associa-  
tions, Inc.

HOWELL ELLIS,  
520 Illinois Building,  
Indianapolis, Indiana,  
Of Counsel.



FILE COPY

Office - Supreme Court, U. S.

FILED

MAR 26 1945

CHARLES ELMORE BROPLEY  
CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 449.

REGULAR COMMON CARRIERS' CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC.,  
Appellant,

vs.

HANCOCK TRUCK LINES, INC.

Appeal from the District Court of the United States  
for the Southern District of Indiana.

## REPLY BRIEF FOR APPELLANT.

B. W. La TOURETTE,  
G. M. REBMAN,  
818 Olive Street,  
St. Louis, Missouri,  
Counsel for Appellant.

HOWELL ELLIS,  
520 Illinois Building,  
Indianapolis, Indiana,  
Of Counsel.



# INDEX.

	Page
Statement as to order of subject matter appearing herein .....	1
Jurisdiction .....	2
Statement of the case.....	6
Specification of assigned errors.....	7
Summary of argument.....	9
Jurisdiction .....	12
Granting of appeal by single Judge.....	14
This appeal was taken within the statutory time..	15
Argument on the merits.....	16
The order of May 16, 1942.....	18
As to estoppel.....	22
Part of Commission's order complained of does not violate Fifth Amendment.....	22
As to the contention of appellee that Division 4 of the Commission by its order of May 16, 1942, directed that certain things must be done by appellee. ....	23
Part of the Commission's order complained of does not violate Section 206 (a).....	26
Part of Commission's order complained of is violative of Section 216 (d).....	28
Judgment of District Court is violative of Commission's administrative functions.....	28
Waiver .....	29
Substantial parity.....	30
Finding No. 14.....	31
Findings Nos. 15, 16, 17 and 18.....	31
Court below exceeded its jurisdiction.....	31
Conclusion .....	33



### Cases Cited.

Atlas v. United States, 50 Fed. (2d) 808.....	12, 13
Babcock v. Town of Erlanger, 34 F. Supp. 293.....	5
City of Chicago v. Chicago Rapid Transit Co., 284 U. S. 577, 52 S. Ct. 2.....	12
Mary C. Leary v. United States, 32 S. Ct. 599.....	6
Sea Train Lines, Inc., Common Carrier Application No. W-543, decided upon hearing and reconsidera- tion by Interstate Commerce Commission under date of Feb. 6, 1945 ( . . . W. C. C. . . ).....	28
U. S. v. Resler, 61 S. Ct. 820, 313 U. S. 57, 85 L. Ed. 1185 .....	20

### Statutes Cited.

Equity Rule 37.....	6
Federal Rules of Civil Procedure, Rule 24 (c).....	5
Fifth Amendment to the Constitution of the United States .....	11, 26
Interstate Commerce Act, Part II, Secs. 206 and 216 (a) (d) .....	11
Judicial Code, Sec. 45a, Title 28, U. S. C. A...3, 5, 9, 12, 14.	
Transportation Act of 1940, Sec. 306, Title 49, U. S. C. A. (Sec. 203 of the Motor Carrier Act).....	21, 24
Urgent Deficiencies Act of Oct. 22, 1913, C. 32, 38 Stat. 220, Secs. 47, 47a, Title 28, U. S. C. A...2, 4, 9, 13, 15.	

# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944.**

**No. 449.**

**REGULAR COMMON CARRIERS CONFERENCE OF THE  
AMERICAN TRUCKING ASSOCIATIONS, INC.,**  
Appellant,

**vs.**

**HANCOCK TRUCK LINES, INC.**

**Appeal from the District Court of the United States  
for the Southern District of Indiana.**

## **REPLY BRIEF FOR APPELLANT.**

### **STATEMENT AS TO ORDER OF SUBJECT MATTER APPEARING HEREIN.**

Appellant in its reply brief has discussed only such subject matter as appears in Appellee's brief.

The arrangement of the subject matter as well as the topical headings follows the same arrangement and order as appears in Appellee's brief.

## JURISDICTION.

Appellant, at pages 2 to 4, inclusive, of its opening brief sets forth a statement of grounds upon which jurisdiction of this Court is invoked. Appellee now raises the question that our appeal was not timely taken under the provision of the Urgent Deficiencies Act of October 22, 1913, C. 32, 38 Stat. 220, Section 47, 47a, Title 28 U. S. C. A. As is obvious from Appellee's brief they have failed to consider the effect of the provisions of Section 47a, supra, upon the appeal time allowed an aggrieved party from a final judgment or decree of the District Court in the cases specified in Section 44 of this Title. The provisions of said Section 47a are clear and specific as to the time within which an appeal may be taken, said section providing that an aggrieved party may appeal "within 60 days after the entry of such final judgment or decree." It is undoubtedly this oversight as to the provisions of Section 47a which has lead Appellee into the error of asserting that the appeal was not timely taken.

Appellee states that this appellant has no standing in this Court because it is not an "aggrieved party" within the meaning of Section 47a. In Appellant's statement of grounds upon which jurisdiction of this Court is invoked, and at page 4 of its opening brief, the following statement appears:

"The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that this Appellant participated in the proceedings before the Interstate Commerce Commission and is a party in interest therein; that the order of the Commission issued in the said proceedings has been vacated and set aside and the enforcement thereof is permanently enjoined by the findings of the lower Court herein. That by reason thereof Appellant is an aggrieved party within the meaning of Section 47 (a), Title 28 U. S. C."

To this jurisdictional statement we wish to add that Section 45a, Title 28 U. S. C. A., contains the following proviso:

"Provided, that the Interstate Commerce Commission and any party or parties in interest to the proceedings before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: Provided, further, that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. Mar. 3, 1911, c. 231, Sections 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, c. 32, 38 Stat. 220."

In view of the above-cited section of the Judicial Code, it will be clear to the Court that (1) Appellant is an ag-



grieved party within the meaning of Section 47a and (2) under the provisions of Section 45a may have an "appeal of right."

It is further clear that the case at bar is one of the nature referred to in Section 44, Title 28 U. S. C. A., which said section reads as follows:

"(b) in respect to cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission (procedure) shall be as provided in sections 45, 45a, 46; 47, 47a and 48 of this title."

By reason of the quoted portion of Section 44, it is obvious that Sections 45a and 47a must be construed together.

Accordingly we submit that the Court should rule this point against Appellee.

Appellee has attacked our standing in this Court. Similar attack was made at the time intervention in the Court below was sought by this Appellant, but not on the grounds now raised.

As to the contention of Appellee that we have filed no pleadings in this cause and have tendered no issues, we differ. The record (R. 60) shows our filing of a "Petition for Leave to Intervene" on April 8, 1944, and on the same date said petition was granted (R. 61). Said petition states our interest in the cause and by implication, at least, adopts the pleadings of the Interstate Commerce Commission and of the United States. Leave to file answer was prayed and tender thereof made, but leave to file the same was denied upon the objection of Appellee, plaintiff below. The Appellee, under the circumstances, is estopped from raising objection to our appearance herein.

(1) by reason of its failure to timely raise in the Court below the objection which it now argues;

(2) by reason of its action in objecting to our filing formal answer.



As to our right to appear herein, we submit that we have such right by virtue of Section 212 of the Judicial Code, 28 U. S. C. A. 45a, supra, and by virtue of Rule 24 of the Federal Rules of Civil Procedure, with respect to intervention.

Having shown our right to participate in these proceedings under Section 45a, Title 28 U. S. C. A., supra, we clearly come within the provisions of Rule 24 of the Federal Rules of Civil Procedure dealing with the right of intervention. It is our position that Section 45a, supra, confers on this appellant a statutory and absolute right to intervene. Section (c) of Rule 24 of the Federal Rules of Civil Procedure provides as follows:

"The motion (for intervention) shall state the grounds therefor and shall be accompanied by a pleading-setting forth the claim or defense, for which intervention is sought."

That we have substantially complied with the provisions of Subsection (c) of Rule 24, supra, is obvious from a reading of our petition for leave to intervene (R. 60). There we set out in Paragraph 2 our interest in the cause. In Paragraph 3 we set out the fact that we do not seek to broaden the issues involved in this proceeding. A reading of these two paragraphs of our "Petition for Leave to Intervene" definitely shows our position as opposing the complaint filed by Appellee in the Court below and the statement that intervenor does not seek to broaden the issues certainly connotes our intention of adopting the issues which were raised by the pleadings filed in this complaint by the other parties. That such "Petition for Leave to Intervene" fully and adequately complies with Section (c) of Rule 24, supra, is evidenced by the decision of the District Court of Kentucky in the case of Babcock v. Town of Erianger, 34 F. Supp. 293:

"The pleading accompanying the motion to intervene should set up the interest of the party just as in an original bill."

Again, in the case of *Mary C. Leary v. United States*, 32 S. Ct. 599, this Court considered on appeal matters raised by a petition for intervention filed pursuant to Equity Rule 37, wherein the statement of intervenors' interest was set out in the petition for leave to intervene in the same manner as our interest in this cause is set out in our petition. In the case cited no separate pleading was filed. In view of the above and foregoing, and further in view of Appellee's failure to timely oppose our intervention for the reason that no formal answer was filed, we submit that the Appellee's position in this matter is untenable.

#### **STATEMENT OF THE CASE.**

This Appellant at pages 4 to 9, inclusive, of its opening brief, sets forth a detailed "Statement of the Case" which we submit correctly described the issues before the Court. Appellee suggests that Appellant failed to make a concise statement embracing all of the issues now for consideration by this Court. Much of its statement is devoted to matters purely argumentative in nature and relates to the report and order of the Interstate Commerce Commission, Division 4, entered May 16, 1942 (R. 99-105), which said report and order are not material to the issues here. The only report and order of the Interstate Commerce Commission in issue is that entered by the Commission en banc (R. 40-50), in which said report and order the operating authority of Globe Cartage Company, Inc., is limited to the transportation as a common carrier of general commodities except commodities in bulk and those of unusual length, width or weight, which are at the time moving on bills of lading of freight forwarders. We think no further comment necessary with respect to Appellee's so-called corrected Statement of the Case.

### **SPECIFICATION OF ASSIGNED ERRORS.**

Appellee on page 12 of its brief cites our alleged error No. 4, which is as follows:

"In refusing to adopt the findings of fact and conclusions of law submitted by the defendants."

Appellee states that it does not understand that we submitted any findings of fact or conclusions of law. We submit that the error of which we complain is the failure of the Court to adopt the findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission. Certainly in view of our being an aggrieved party, as previously shown, and considering our participation in the instant case as an intervening defendant, we occupy the same position with respect to the above alleged error as do Defendant Appellants United States and Interstate Commerce Commission.

With reference to alleged error 16, page 12 of our opening brief, which Appellee next attacks in its answer brief, page 12, we submit that the alleged findings of fact and conclusions of law do not adequately state legal, cogent, or compelling reasons for the Court's decision or for its final decree entered herein for the reasons (a) that said findings of fact on their face show that the Court below considered matters wholly immaterial and extraneous to the issues presented, in reaching its conclusions of law, and (b) that the Court below did not have before it the record made in this proceeding before the Interstate Commerce Commission and accordingly made findings of fact without the benefit of such record, from which alone it could determine the true facts of the case.

As to the alleged error 17 of this Appellant set out on page 12 of our opening brief, we submit that this Appellee has wholly failed in the Court below and again in its brief

filed herein to show that it was denied all its property without due process of law. Accordingly we submit that this action does not arise under the Fifth Amendment.

Further, on page 13 of Appellee's brief, it is stated:

"That all of the remaining ones (alleged errors) depend for their vitality upon getting the Court to disregard the Commission's order of May 16, 1942, as suggested in alleged error No. 8, page 11 of its (Appellant's) brief."

With this proposition we shall treat subsequently in our brief. However, we wish to point out to the Court that it is not the position of this Appellant to have the Court disregard the Commission's order of May 16, 1942. Rather Appellee would have the Court consider the said Commission's order of May 16, 1942 as bearing upon the scope of the operating rights of Globe Cartage Company, Inc., whereas in truth and in fact the scope thereof is made the subject of the order of the Commission of August 4, 1943. We again repeat that the said order of May 16, 1942, did not deal in any manner with the determination of the scope of the operating rights of Globe Cartage Company, Inc., but rather with the matter of purchase by Appellee of whatever operating rights might finally be determined by the Commission to have been vested in Globe Cartage Company, Inc.

### SUMMARY OF ARGUMENT.

- (1) Appellant, by virtue of Section 212 of the Judicial Code, 28 U. S. C. A. 45a, is of right a party to this proceeding; its petition for intervention was duly filed in the Court below; its application for leave to file separate answer was denied by the Court below. Judicial Code 212, 28 U. S. C. A. 45a.
- (2) It is elementary that presentation, argument or discussion of matters without merit is an imposition upon the Court, and failure to answer such matters does not constitute a waiver of the right of a party in interest to proceed on the merits of the case.
- (3) The appeal was taken within the 60 days prescribed in the Urgent Deficiencies Act. 28 U. S. C. A. 47a.
- (4) The ministerial Act of the Court in granting an appeal does not require the action of three judges. Section 28 U. S. C. A. 47, quoted by Appellee, has no application to the granting of an appeal from a final decree.
- (5) Appellee has consistently confused and misinterpreted the effect of the order of the Commission, Division 4, issued under date of May 16, 1942. Appellee's confusion has led it and the Court below into patent error.
- (6) The limitation order entered on August 4, 1943, is fully sustained by the facts of record before the Commission and is not only a lawful restriction, but is a restriction mandated by Congress in a proper case.
- (7) The findings and order of the Commission, Division 4, entered May 16, 1942, was
  - (a) made on sole application of Appellee and its predecessor in interest;
  - (b) permissive only; authorizing not directing or requiring the parties to consummate their agreement



dated November 4, 1941, more than one and one-half months prior to application to the Commission for authority to consummate the transaction;

(c) not and could not be determinative of the scope or nature of operating rights to which Globe may have been entitled;

(d) careful to point out to Appellee that it authorized the transfer of "claimed rights," not "determined or confirmed" rights.

(8) The said findings and order of the Commission, Division 4, entered on May 16, 1942, could not and made no attempt to create or establish vested property rights in Appellee.

(9) The order entered on August 4, 1943, did not attempt to modify in any particular the authorization granted by the Division 4 order of May 16, 1942; said order of August 4, 1943, was not collateral to the proceedings before Division 4; said order of August 4, 1943, was entered pursuant to an application filed by Appellee's predecessor in interest and was determinative of the issues tendered by such application.

(10) Appellee does not complain, nor has it at any stage of these proceedings offered one scintilla of evidence that the proceedings of the Commission which culminated in the order of August 4, 1943, were had without affording to Appellee notice, opportunity to be heard, to present its evidence, to examine and cross-examine witnesses offered against it; Appellee has not complained that it was not afforded a fair and impartial trial.

(11) As pointed out in our brief heretofore filed, pages 14, 15, 20 and 21, Appellee has not only failed to offer evidence tending to prove that the facts before the Commission do not support the findings and order of the Commission under date of August 4, 1943, but Appellee has con-

sistently admitted that the findings of the Commission are fully supported by the facts of record.

(12) The Appellee has wholly failed to prove by any evidence of record that the enforcement of the Commission's order of August 4, 1943, would deprive it of its property without due process of law, in violation of the Fifth Amendment, and in violation of Sections 206 and 216 (a) (d), Part II, of the Interstate Commerce Act.

(13) The sole and only issue before this Court is the legality and propriety under the facts of that part of the Commission's order of August 4, 1943, restricting and limiting the certificate granted on the Globe "grandfather rights" to the transportation of general commodities "which are at the time moving on bills of lading of freight forwarders."

(14) The Court below substituted its judgment for that of the Commission in that it found that "that part of the order complained of herein is not sustained or justified by any fact found by the Commission" and sought on that basis alone to void the Commission's order, without remanding the cause to the Commission.

(a) The facts of record before the Commission were not before the Court below, hence the Court had no alternative other than to remand the cause, instructing the Commission to proceed in its determination of the cause in a manner in keeping with the Court's statement of the law.

(b) The Court by entering its order and decree usurped powers and jurisdiction committed by Congress solely to the Commission.

### JURISDICTION.

Appellee in its brief cites the case of *City of Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577, 52 S. Ct. 2, stating that it is unable to distinguish said case from the case at bar. Appellee has apparently failed to understand the reasoning of the Court in the *Chicago* case, *supra*. The facts in the *Chicago* case briefly are, that the Chicago Rapid Transit Company sued to enjoin the Illinois Commerce Commission and the Attorney General of the State of Illinois from enforcing a rate order entered by the Illinois Commission. A three judge Court entered a final decree wherein it enjoined the Illinois Commerce Commission and the Attorney General from enforcing the order complained of. Neither of the two defendants appealed from the decree, which this Court said was "a final adjudication of the invalidity of the rate order." Obviously the order became final upon a failure of either the Illinois Commerce Commission or the Attorney General to appeal. There was no order from which the City of Chicago could separately appeal. The Supreme Court could not take jurisdiction of the matter, except on an appeal by the parties specifically enjoined. Had the Illinois Commission and the Attorney General, or either of them appealed, it is obvious from a reading of the above decision that the City of Chicago's appeal would have been entertained by this Court. Further the case cited by appellee is not one within the purview of Section 45a, Title 28, U. S. C. A., as is the case at bar.

Appellee then cites the case of *Atles v. United States*, 50 Fed. (2d) 808, alleging that appellant herein is a stranger to the judgment below. Section 45a, *supra*, sufficiently described the position of appellant herein as being a party to this proceeding and removes any doubt which may exist as to our right to appeal. Certainly under said Section 45a, *supra*, this appellant is not a stranger to this

proceeding. The contention of appellee that appellant has not shown that it was recognized as a party to the proceedings in the Court below is a falsification of the record in this case (R. 61) wherein it is pointed out:

"(Entry for April 8, 1944, continued) which said petition (Petition for Leave to Intervene) is granted and the Regular Common Carrier Conference of the American Trucking Associations, Inc., is given leave to intervene as a party herein" (R. 61).

As to the case of *Atles v. United States*, supra, even a casual reading of said case will disclose that it is not applicable to the case at bar for the following reasons:

(a) In the *Atles* case, supra, Jennie Atles sought to appeal from a decree which admittedly was not adverse to her, nor in any wise affected either her or any right which she had; whereas in the instant case, this Appellant has shown an interest in the cause, has shown that the decree of the Court below was adverse to such interests. The Appellee has not once in this proceeding, whether before the Commission or the Court below, questioned or denied our interest herein. Under familiar rules, Appellee is now in no position to complain or raise such issue, as it has by its previous silence admitted our interest.

(b) This appeal arises and the Court has jurisdiction thereof by virtue of the provisions of Sections 45a and 47a, Title 28, U. S. C. A., supra; such sections were not applicable to the *Atles* case, supra.

In its brief, at page 20, appellee states, "Appellant has waived its right to be heard in this cause; our Statement Opposing Jurisdiction in this Court was filed on August 2, 1944; no answer has ever been made thereto by this Appellant, although Rule 7 (3) clearly contemplates that when a jurisdictional question is presented as provided by Rule 12, paragraph 3, the appellant shall file a brief opposing same." Appellee has obviously misconstrued



the Rules of this Court and more particularly Rule 12 (3), which says in part:

“where such a motion is made, it **may** be opposed as provided in Rule 7, paragraph 3.”

Nowhere in the Rules of this Court do we find a Rule requiring an Appellant to oppose such motion. We elect to stand upon our jurisdictional statement and submit that “Appellee’s Statement Against Jurisdiction of the Supreme Court and Motion to Dismiss or Affirm” is so replete with obvious error and misconstruction of the law as not to require specific answer. Under the statutes cited in our Jurisdictional Statement, and by virtue of the provisions of Section 45a, Title 28, U. S. C. A., we submit that this Court has jurisdiction to hear and try the appeal herein.

#### **Granting of Appeal by Single Judge.**

Appellee has spent a considerable portion of its brief to a discussion of matters which it contends prove a lack of jurisdiction in this Court over the appeals herein. As previously indicated this argument and discussion of Appellee has little or no merit. For this reason, as above pointed out, we had not considered it necessary to discuss any of the matters which Appellee raised in its “Statement Against Jurisdiction.”

We cannot at this point, however, refrain from briefly discussing the untenable position which Appellee takes with respect to the fact that the appeal herein was granted by a single judge. Not one portion of Appellee’s argument sustains its position. Appellee cites Section 47 and several cases as supporting its position. All of the cases cited refer to the doing of purely judicial acts, matters requiring the exercise of a discretion by the Court. Certainly as to the exercise of a discretion in matters properly before a three judge court, all three judges must be sitting and pass upon them. However, since under Sections 47 and 47a, supra, the granting of an appeal is a matter



as of right, the Court has no discretion to exercise, Congress has exercised it and delegated the performance of a purely "ministerial" act to the Court. The convening of three judges to sit and grant an appeal under such circumstances was not and could not have been contemplated by Congress, for it would entail a needless loss and waste of time and expense. It would be an extravagance not required by law.

Appellee in this portion of its brief refers to a petition filed in the lower Court asking the Court to vacate its judgment of May 25, 1944. We shall discuss this matter insofar as it affects this appeal, under our next heading.

#### **This Appeal Was Taken Within the Statutory Time.**

We feel that counsel for the United States and the Interstate Commerce Commission have fully and ably briefed this matter and specifically adopt such portion of their brief as our own, inasmuch as we do not desire to burden this Court with repetitious matter.

We do, however, point out that Section 47a, Title 28, U. S. C. A., specifically provides that an appeal may be taken "within sixty days after the entry of such final judgment or decree."

The language of a statute could not be clearer than that above quoted. As to the matter of filing of a petition to set aside and vacate the Lower Court's Decree, such action and any admissions therein made could in no wise affect the jurisdiction of this Court, for the jurisdiction is plainly fixed by the above statute; further, the matter which Appellee sets out in its brief is dehors the record. It is elementary that this Court will not consider matters outside the record.

We do not, as Appellee contends, claim that the appeal time had expired. Any and all explanation of our position is found in Section 47a, Title 28, U. S. C. A., which we reiterate is plain, concise and clear as to the sixty days time within which to appeal.

### ARGUMENT ON THE MERITS.

Appellee in its brief states that "Appellant does not present the case that was tried below, nor state the question which must be decided in this appeal." The position which Appellee takes herein is difficult to understand considering that the sole complaint which Appellee made in its Complaint before the Court below was that the order of the Commission under date of August 4, 1943, restricting Appellee to the "transportation of general commodities that are at the time moving on forwarders' bills of lading" is illegal and void as exceeding the power and authority delegated to the Commission by Congress for the reason that:

"(a) The Commission having found as a fact that the applicant, Globe Cartage Company, Inc., predecessor in interest of plaintiff, was a common carrier by motor vehicle and as such was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory described in number 6 of this complaint, and for which an application for a certificate had been made as aforesaid, and had so continuously operated since that time, it was the statutory duty of the Commission to issue a certificate of public convenience and necessity to such applicant, or to this plaintiff as its successor in interest, without further proceedings, and without inserting either in the order therefor, or in such certificate, the words 'which are at the time moving on bills of lading of freight forwarders,' and the Commission had no power, right or authority to insert and include said words in said order, or to include the same in the certificate when issued.

"(b) The inclusion of said quoted words in said order, and in said certificate, is an unlawful and illegal restriction against and constraint upon plaintiff, not authorized

by law, and is an unjust, unreasonable and capricious limitation upon the rights, privileges and duties of the plaintiff as a common carrier of general commodities by motor vehicle for compensation, and will deprive plaintiff of its rights and property without due process of law in violation of the Constitution of the United States and the Fifth Amendment thereto.

“(c) The attempt by the Commission to limit the operations of the plaintiff by the terms of said order to commodities which are at the time moving on bills of lading of freight carriers, is an illegal and unreasonable limitation and restriction, and is a violation of that part of Section 206 of said Act which mandates the Commission to issue such certificate, without further proceedings, where, as in this case, the Commission found as a fact that Globe Cartage Co., Inc., was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes designated, and had so operated since that time, and upon such findings of fact, the Commission had no power, authority or discretion under said act to make any order, or embody within such certificate, a provision limiting the rights and duties of such common carrier to commodities at the time moving on bills of lading of freight forwarders; such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against the plaintiff as a common carrier by motor vehicles, and is contrary to public policy.”

Since Appellee did not choose to introduce before the Court below the record made before the Commission in the matter of Globe Cartage Co., Inc., common carrier application, the sole and only question presented is that raised by the Complaint filed by Appellee in the Court below, namely:

The question of the authority and power delegated by Congress to the Interstate Commerce Commission to place a limitation or restriction upon a certificate issued to a common carrier in a "grandfather" proceeding, limiting the type of service to be performed to the transportation of general commodities that are at the time moving on forwarder's bills of lading.

The above is the only question presented. In determining this issue this Court is confined under the pleadings in this case and the record made before the District Court, to a consideration of the main question above, and to the collateral issue that the findings of the commission in its order of August 4, 1943, do not warrant or authorize the restriction placed on the authorized certificate. This latter issue necessarily arises out of the main issue.

We submit that we have discussed these issues fully in our opening brief. However, in view of the nature of appellee's argument, as well as the many collateral issues which it raises, we feel constrained to discuss certain phases of appellee's brief at length, even to the point of being charged with repetition of matters set out in our opening brief. If such latter be the case, we ask this Court to be indulgent and bear with us.

#### **The Order of May 16, 1942.**

So as not to add to the confusion created by appellee's fanciful discussion of purely fictitious issues, appellant shall treat of the argument set forth in appellee's brief in the same order in which said argument is therein set out.

Appellee states at page 27 of its brief, "In order to better understand our contention concerning the consideration to which appellee is entitled by reason of the peculiar facts in this record," it then goes on to cite reasons as to why it sets out in three and one-half pages of its brief, pages 27-31, a "summary" of certain facts allegedly found by Division 4 of the Commission in a proceeding brought by



appellee to acquire whatever operating authority Globe Cartage Co., Inc., may have been found to be entitled to by reason of a "grandfather" application then pending before the Commission.

We submit that the order of May 16, 1942, is not in issue in this cause, that it is wholly immaterial, irrelevant and extraneous to any issue tendered by the pleadings in this cause in the Court below.

We would be content to dismiss the statements in appellee's brief on this point with the above statement, except for the confusion and resultant error into which the Court below was led by reason of appellee's insistence of this point.

Appellee in its brief, page 31, says that "the lower Court found as a fact that following said findings and order of the Commission of May 16, 1942, appellee, Hancock Truck Lines, Incorporated, in reliance on such findings and order, paid to Globe said \$9,900.00, the balance of the purchase price for such common carrier operating rights." In the above short sentence, which is a restatement of Finding No. 16 of the Findings of Fact of the Court below, no less than two errors are apparent; the first, that Hancock, "in reliance on such findings and order, paid to Globe said \$9,900.00." Having no consideration for the nature of the proceedings out of which said order of May 16, 1942, emanated, the Court below indiscreetly used, as does this appellee, the words "in reliance." A more correct terminology would have been by virtue of the "authority" or "permission granted to Hancock, it paid to Globe voluntarily, of its own free will, with its eyes open (to use the language common to all) said \$9,900.00." Appellee would have this Court believe, as it apparently erroneously convinced the Court below, that the Commission's Order of May 16, 1942, compelled it to pay said \$9,900.00 to Globe; in fact, at pages 35-36 of appellee's brief it is said that "the order entered under Section 5 (May 16, 1942) was



very comprehensive, and not only impliedly authorized, but directed, appellee to pay Globe \$9,900.00 for its common carrier operating rights." This is not true, since Section 5 provides for the granting of permissive authority only.

The order of May 16, 1942, if it directed appellee, was illegal and void as exceeding the authority delegated to the Commission. This Court has recognized the "permissive" language of said section. *U. S. v. Resler*, 61 S. Ct. 820, 313 U. S. 57, 85 L. Ed. 1185. But let us look at the "compelling" or "directing" language of the order of May 16, 1942 (R. 104). First, however, let us turn to the language employed by the Commission in its report on said proceedings (R. 104):

"provided, however, that, if the authority herein granted is exercised."

Now to the order itself (R. 104-105):

"It is further ordered that if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

"It is further ordered that unless the authority herein granted is exercised within six months from the date hereof, this order shall be of no further force and effect."

More, we cannot say.

The second patent error in the statement taken from page 31 of appellee's brief, and which statement the Court below made in its Finding of Fact No. 16, is contained in the phrase "for such common carrier operating rights."

The order of the Commission, Division 4 (R. 99-105) contains the following language: (1) Only such "grandfather" common-carrier rights which **may be** confirmed as a result of those applications." (Applications filed by Globe under Section 206 of the Motor Carrier Act, as amended by the Transportation Act of 1940, Section 306, Title 49, U. S. C. A.).

(2) "The nature and extent of the service which Hancock may render in conducting operations under the unified rights must be governed by the existing rights as confirmed and lawfully claimed" by Globe.

(3) "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act, except section 5 thereof, as expressly determined herein."

If the above quotations from the Report and Order of Division 4 of the Commission do not convict appellee, as well as the Court below, of error, it is submitted there is no error.

Appellee at its own risk and upon its own initiative undertook to complete the transaction which it had entered into some six or more weeks prior to petitioning the Commission for permission therefor, with full, adequate and complete warning that Globe's rights, if any, were, still subject to determination by the Commission under another "section of the Act," being Section 206. Appellee thus voluntarily placed itself in the position whereby it has suffered or will suffer the damage which it alleges. Under the circumstances, Appellee cannot be heard to complain. The law speaks of such position tersely—"damnum absque injuria." A loss, self-induced, for which the law does not, because it cannot, in justice, afford a remedy.

Granting that no issue of fact was tendered respecting said alleged damage; granting that such damage will occur, if the Commission is sustained, as it should be, we again submit that any matter, any evidence, and any argument respecting the order of May 16, 1942, and the effect thereof, is wholly immaterial and extraneous to the issues which not only were tendered, but which only could be raised in this proceeding.

**As to Estoppel.**

In view of what has been said in our opening brief, we submit that estoppel cannot be asserted against the Government, nor any of its agencies.

However, if such defense were able to be urged, we submit for reasons set out in our discussion respecting the order of May 16, 1942, that such defense is not available to this Appellee.

We shall not treat of this question further, believing as we do that it is not properly an issue in the instant cause.

**Part of Commission's Order Complained of  
Does Not Violate Fifth Amendment.**

Appellee in its brief seemingly admits a familiarity with the distinction which exists between proceedings under Section 5, being acquisition proceedings, and proceedings under Section 206, in the nature of a "grandfather" proceedings. As Appellee has tersely stated it, "the issues are entirely different." Admitting this as Appellee does, it then falls into the error of "confounding and intermingling" the order of May 16, 1942, a Section 5 order, with the order of August 4, 1943, an order entered pursuant to the "grandfather" clause of Section 206.

The error is the result of considering the order of May 16, 1942, as having "furnished the foundation for the creation of certain property rights," and as having "directed that certain things must be done by appellee." As to the

effect of the May 16, 1942, order furnishing the foundation for the creation of certain property rights, we reiterate that the Commission in its said order consistently termed the Globe rights which Appellee had contracted to acquire and for which acquisition it sought the Commission's consent or permission, as "claimed rights" and as pointed out above, the Commission was over zealous to point out that its May 16, 1942, order was not to be "construed as a determination of the operating rights of any person or persons." This precaution was taken by Division 4 of the Commission in the face of the record facts that both Hancock and Globe were controlled by the same person, Major A. Riddle (R. 100), who is charged with a knowledge of the extent of Globe's "grandfather" rights and who fully understood the effect of the "grandfather" clause upon such rights. If, however, it is claimed that Appellee by reason of the unauthorized expansion of the Globe rights after the May 16, 1942, order of Division 4 of the Commission, acquired "certain property rights" in and to such unauthorized expansion, further error has been committed by Appellee, for it well understood that the Globe "grandfather" rights had not as then been determined, and, further, it knew or should have known that unauthorized operations cannot be claimed as the basis for operating authority under the "grandfather" clause.

**As to the Contention of Appellee That Division 4 of  
the Commission by Its Order of May 16, 1942,**

**Directed That Certain Things Must  
Be Done by Appellee.**

We submit that we have made sufficient answer to said contention in a previous portion of our reply brief.

The Appellee contends that the Commission En Banc in its report and order of August 4, 1943, collaterally set aside the order of Division 4 of the Commission, made on May 16, 1942, contrary to the provisions of Section 5 (9).

A reading of the Transportation Act of 1940, which amended the Motor Carrier Act of 1935, and more particularly a study of the provisions of Section 206 particularly as they relate to "grandfather" cases, and a comparison of said provisions with Section 5 of the Act and more particularly of Section 5 (9) will clearly show what we have contended in our opening statement, namely: that proceedings under the two sections are entirely separate and distinct and have for their purpose entirely different aims and ends. We feel that we have discussed this distinction sufficiently in our opening brief, and that further discussion and argument is unnecessary.

Appellee contends that it had no notice and no hearing respecting the action of August 4, 1943, taken by the Commission En Banc. We may pass over this contention at this time for the reason that such issue was not tendered in the Court below. Further, for the reason that the record made before the Court below as well as the record before the Commission is absolutely devoid of any evidence tending to prove that the action of the Commission En Banc, under date of August 4, 1943, was taken without notice to Appellee. The said action of the Commission En Banc, under date of August 4, 1943, with reference to the determination of the operating rights of Globe was taken as a further and final step in the proceedings instituted by the said Globe, predecessor in interest to Appellee, under Section 206 of the Transportation Act of 1940, and more particularly under the "grandfather" provisions thereof, so that the finding of the Commission in said order of August 4, 1943, was grounded entirely upon what the record evidenced before the Commission in this proceeding, as to the operation which was performed by Globe on, prior and subsequent to June 1, 1935. The Commission in its said order of August 4, 1943, was not required, as Appellee contends it was, to make any finding as to consistency with the public interest, or as to what



was just and reasonable. This action of the Commission was, as we pointed out in our opening brief, taken by it pursuant to the mandate of Congress as set out in Sections 206 and 208 of the Transportation Act of 1940. In view of the above circumstances, the language of this Court in the McClean Trucking Company Case, 321 U. S. 67, has no bearing whatsoever upon the issues in this case.

Much of the argument set out on pages 38 and 39 is wholly immaterial to the issues presented in this case, and certainly does not afford any answer to the "question actually presented" as set out on page 27 of Appellee's brief. For the above reasons, we will not discuss this matter further except to reiterate a statement previously made in this reply brief respecting the effect of the order of May 16, 1942, as being a vested property right of Appellee. We have previously challenged a similar statement, and again challenge the Appellee's statement herein for the reason that the said order of May 16, 1942, could not, under the law, vest in the Appellee any property right of any nature whatsoever, the said order of May 16, 1942, being purely a permissive order.

We conclude from the above that this Appellee was not deprived of any of its property without due process of law. In fact, the record made before the Commission in the Globe proceedings clearly demonstrates that Globe usurped and sought in an unauthorized manner to invade upon the property rights of others, for, as frequently pointed out in our brief, the Globe operation on and subsequent to June 1, 1935, and even as late as May 16, 1942, was an operation confined solely to the transportation of general commodities that were at the time moving on forwarder's bills of lading. As we have pointed out in our opening brief, the Appellee, in various of its briefs and arguments made before the Commission, admits that such was the fact. Appellee at this juncture makes no attempt to explain away its admissions for the reason that the

record admits of no explanation. For all of the above and foregoing reasons we submit that the requirements of the Fifth Amendment to the Constitution have been fully complied with and met in the instant case, so far as the Appellee is concerned.

**Part of the Commission's Order Complained of  
Does Not Violate Section 206 (a).**

Appellant feels that it has discussed this phase of the case more than adequately in its opening brief. However, inasmuch as it is this question, and only this question, which is properly before the Court, we feel constrained to add briefly to the statements in our opening brief. The Appellee seems to be of the opinion that the language of Section 206(a) which authorizes the Commission and directs it in a "grandfather" case to issue "such certificate without requiring further proof that public convenience and necessity will be served," requires the Commission without a hearing to issue to Applicant, solely upon the unproven allegations contained in its application, a certificate of public convenience and necessity. Under the Appellee's interpretation of this Section 206(a), it would have been possible for every motor carrier making an application thereunder to have claimed an operation as extensive and broad as the United States authorizing him to perform and carry on a transportation service as broad as he desired without any further proof on the part of such Applicant that he was "in bona fide operation as a common carrier by a motor vehicle on June 1, 1935" [Section 206(a)]. Certainly, Appellee's position is ridiculous and absurd when we consider the above. The Congress in legislating on the subject could not have intended any such result. As a fact, the language of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940, belies the position taken by Appellee. In addition to the above, Appellee completely overlooks

the language of Section 208 which must be read in pari materia with the language of Section 206(a). This Section 208 imposes upon the Commission in the issuance of a certificate the duty of limiting such certificate, in this language:

"Any certificate issued under Section 306 or 307 shall specify the service to be rendered."

Further, said Section provides:

"and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the **privileges** granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

True, in a "grandfather" case the Commission is not permitted under Section 206(a) to inquire into the question of public convenience and necessity for the act definitely provides that operations conducted on June 1, 1935, are conclusive evidence of the public convenience and necessity. It is only such proof, namely: proof that goes to the question of public convenience and necessity, that is dispensed with in a "grandfather" case under Section 206(a). Further than that, the Applicant is required by the Act, as well as by the rules and regulations issued and promulgated by the Commission, to substantiate its claims as to territory, as to routes, and as to services rendered, by definite and unequivocal proof of its operations on June 1, 1935, and subsequent thereto. We have in numerous places in our opening brief pointed out that the record made before the Commission, which record was not introduced before the lower Court, clearly shows that the limitation imposed upon the certificate granted Appellee growing out of the Globe operations was supported by the facts before the Commission.

To shorten our brief without necessarily detracting

from its forcefulness, we feel that the above statement has furnished sufficient answer to the argument set out on pages 43, 44 and 45 of Appellee's brief under the heading, "Void part of Commission's order complained of is capricious and unreasonable."

We submit that all that has been said herein, as well as matters set out in our opening brief, fully and completely answers these objections of Appellee. (Sea Train Lines, Inc., Common Carrier Application No. W-543, decided upon hearing and reconsideration by the Interstate Commerce Commission under date of February 6, 1945 [.... W. C. C. ....].)

**Part of Commission's Order Complained of  
Is Violative of Section 216(d).**

The Appellee in its brief for the first time in this case raises the issue that the restriction placed upon the certificate growing out of the Globe operations is violative of Section 216(d) of the Motor Carrier Act, 1935, as amended by the Transportation Act of 1940. Section 216(d) being the same as Section 316(d), Title 49, U. S. C. A., refers to, as its heading shows, undue preferences or prejudices prohibited. The scope of Section 316, Title 49, U. S. C. A., is "rates, fares and charges." We submit that not only is this charge set out on page 42 of Appellee's brief untimely raised, but it has no application or materiality to the issues in this cause and accordingly we submit that the Court cannot consider same.

**Judgment of District Court Is Violative of  
Commission's Administrative Functions.**

Appellant has discussed this subject at some length in its opening brief. However, to clarify such discussion if need be we submit that the District Court in setting aside the limitation imposed by the Commission



in its August 4, 1943, order and in effect writing a new certificate for Appellee as successor in interest to Globe invaded upon the province committed solely to the Interstate Commerce Commission by Congress. Certainly the Court below, as we have so frequently pointed out, did not have the facts before it which the Commission had of record in the Globe case. Under such circumstances the Court could not advisedly or otherwise find as a fact that the Globe operations were other than as defined in the Commission's order of August 4, 1943. It is the settled law announced by this Court that under the circumstances which prevail in this case, the Court below was limited to a determination as to whether or not the findings of the Commission as expressed in its report substantiated the order entered. This the Court was unable to do because it did not have the record before it. Under the circumstances a remand of the case was the only proper order for the Court to have entered had it determined the case favorably to Appellee. We submit, however, that the Court committed additional error and that its judgment and decree was for the wrong party.

#### Waiver.

On pages 48 to 51, inclusive, of Appellee's brief, Appellee goes into considerable discussion as to its waiver of the objection to the restriction imposed by the Commission's order of August 4, 1943. We submit that whether the action of Appellee before the Commission be called waiver or be denominated by any other term, the Appellee has failed to exhaust its remedies before the Interstate Commerce Commission which, as this Court has so frequently said, is a condition precedent and an absolute prerequisite to the seeking of injunctive relief in a Court of law.

Under such circumstances, considering the facts of record before the Commission in the Globe case, which facts



this Appellee has not once contended support any finding other and different from that made by the Commission in its order of August 4, 1943, as well as the admissions of such facts as made by this Appellee in various of its briefs and petitions filed before the Interstate Commerce Commission, which said petitions and briefs are set out in full in the record in this case, we submit that Appellee is now estopped from raising any question as to the limitation imposed by the Commission in its order of August 4, 1943.

On pages 51 through 54 of Appellee's brief, Appellee contends that the Commission did not find that Globe was not holding itself out to transport property for all shippers. We submit that the report and order of the Commission en banc under date of August 4, 1943, contains such finding of fact and said report and order contains the following language:

"During this entire period, Globe has transported only traffic tendered to them by the Universal Carloading & Distributing Company" (R. 42).

We further submit that any further finding respecting holding out was not only unnecessary, but would have been wholly improper in view of the admissions made by Appellee before the Commission that it did not so hold itself out, but that its "assumption during the grandfather period was to transport for freight forwarders" (R. 130).

#### **Substantial Parity.**

We submit that the argument made and discussion had in our opening brief adequately answers the brief of Appellee on this point. The cases therein cited are clear and convincing as to the injunction imposed upon the Commission by Congress of effecting and maintaining in a grandfather certificate a substantial parity between future operations and prior bona fide operations.

### **Finding No. 14.**

The statement contained at page 30 of our opening brief adequately expresses our position with reference to the error which the Court below committed in its Finding No. 14, for the sole question in issue as raised by plaintiff's petition was as previously pointed out, the right of the Commission to limit or restrict the certificate issued by the Commission and growing out of the Globe operations. Certainly anything which may have been done subsequent to May 16, 1942, or any condition which may have obtained as well as any expansion which the Appellee may have undertaken as of May 16, 1942, or subsequent thereto could not in any way affect the certificate to which Appellee was entitled as successor in interest to Globe Cartage Company, Inc.

### **Findings Nos. 15, 16, 17 and 18.**

Appellee in its brief, page 56, does not challenge the merits of our argument concerning the error of the Court below in making said findings in this case. Rather, Appellee states that "if such facts are immaterial, they can do the Appellant no harm." We submit that the Court based its decree at least in part upon such findings which, as we contend, were immaterial to the issues presented in this cause, for which reason as well as other reasons set out in our opening brief with respect to these findings the Court was in error.

### **Court Below Exceeded Its Jurisdiction.**

Appellee, at page 56 of its brief, states that:

"Appellant has not accurately stated the full measure of Appellee's attack on the order of the Commission on page 28 of its brief."

We challenge this wholly unfounded charge of inaccuracy. We further challenge this Appellee to point out to

this Court any other attack made in its petition upon the final order of the Commission under date of August 4, 1943. The attacking part of Appellee's petition in the Court below is contained in Paragraph 15 (a), (b) and (c) of its petition (R. 6 and 7). In view of such circumstance and of the restricted manner in which the Appellee challenges the Commission's order, we reiterate the statements set out in our opening brief on pages 27 through 34, inclusive. For the reasons therein set out, we submit that the Court very obviously not only exceeded its jurisdiction, but made findings without benefit of the facts as found before the Commission. Further from the evidence which the Court had before it, the Court's finding that the Commission had failed to find that the restriction complained of in the complaint is a reasonable term condition or limitation required by the public convenience and necessity is wholly unwarranted in view of all of the statements contained in the Commission's report and order of August 4, 1943. Further, the Court's finding that the Commission failed to find that it would be consistent with the public interest to place such restriction in said order is an error of law for the reason that the controlling sections of the Motor Carrier Act, 1935, as amended by the Transportation Act of 1940 do not require the Commission to make a finding of consistency with the public interest in a grandfather case relating to an alleged common carrier operation. The finding of the Court that the Commission failed to find that good cause exists for changing its order of May 16, 1942, is wholly without support from the evidence introduced in the Court below for the reason that no showing was made that the order of May 16, 1942, was changed. The Appellees have not only not introduced any evidence to show that the Commission changed its order of May 16, 1942, but also are incapable of producing such evidence.

The Court below further found that the Commission failed to find that it is just and reasonable to place such

restrictions in such certificate. In the Act, Sections 206 and 208 do not require any such findings and accordingly the Court erred in making this finding. The further findings cited on page 57 of Appellee's brief, numbered E through I, inclusive, definitely constitute error on the part of the Court below for the reason that the finding set out under Paragraph E is contrary to the evidence introduced before the Court below. The finding set out in Paragraph F of Appellee's brief is erroneous and is not supported by any fact of record before the Court below. Further, said finding is not a finding of fact but is a definite and obvious conclusion of law without support of record and contrary to the evidence introduced in the Court below. The finding set out under Paragraph G on page 57 of Appellee's brief again is wholly unwarranted from the evidence introduced in the Court below. The Appellee did not introduce either before the Commission or before the Court below any evidence whatsoever that such order complained of is discriminatory against the Appellee, and considering the admissions which Appellee made before the Commission and which were of record in the Court below, the Court's finding in this particular is not only not supported by the evidence before it but is absolutely contrary to it. The same can be said with reference to the findings set out under Paragraphs H and I, page 57 of Appellee's brief.

We submit that if the above mentioned errors do not constitute and point out mistakes of fact made by the Court below, it is impossible for a mistake of fact to exist in any case.

### CONCLUSION.

In conclusion we wish to point out to this Court that any discrimination of which this Appellee complains, that any restriction of which it complains, that any limitation concerning which it may raise its voice was self-imposed

by reason of the character of the service which it not only performed but which it sought to render and held itself out to render on and subsequent to June 1, 1935.

Accordingly we submit that this Appellee has no standing in this Court or any other Court to challenge the findings of the Commission as set out in its report and order under date of August 4, 1943. We submit that the Court below was in error, that the report and order of the Commission of August 4, 1943, was more than adequately substantiated by the facts and admissions of record before the Commission, and that such report and order of August 4, 1943, be reinstated and be the order of the Commission in this cause.

Respectfully submitted

B. W. La TOURETTE,

G. M. REBMAN,

818 Olive Street,

St. Louis, Missouri,

Attorneys for Regular Common Carrier  
Conference of the American Trucking  
Associations, Inc.

HOWELL ELLIS,

520 Illinois Building,

Indianapolis, Indiana,

Of Counsel.

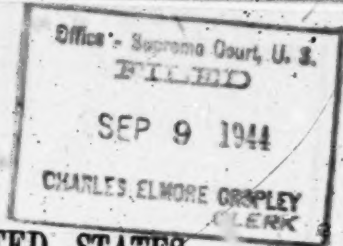


R

AP



FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 449

REGULAR COMMON CARRIERS CONFERENCE OF  
THE AMERICAN TRUCKING ASSOCIATIONS,  
INC.,

*Appellant,*

*vs.*

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF INDIANA

STATEMENT OPPOSING JURISDICTION AND  
MOTION TO DISMISS OR AFFIRM

JACOB WEISS,  
ALBERT WARD,  
FERDINAND BORN,  
*Counsel for Appellee.*



## INDEX

### SUBJECT INDEX

	Page
Statement opposing jurisdiction	1
Appeal not taken in time	3
Appeal not properly taken	3
No substantial question involved	3
Appellant cannot present a substantial question by adopting same assignment of error, peti- tion for appeal, etc., of main defendants	4
Appellant is estopped from claiming right of appeal	5
Statutory provisions	6
Cases denying jurisdiction of Supreme Court where appeal not taken within statutory time allowed	7
Statutory provisions relied on by appellant does not sustain jurisdiction	8
History of Sections 47 and 47a	10
Commerce Court	10
Commerce Court abolished	12
Section 47a	13
Appellant admits that time for appeal expired	15
Motion to dismiss or affirm	16
Exhibit A. Motion to set aside judgment	17

### TABLE OF CASES CITED

<i>Atles v. United States</i> , 50 F. (2d) 808	5
<i>City of Chicago v. Chicago Transit Co.</i> , 284 U. S. 577	5
<i>Consolidated Gas Co. v. Newton</i> , 256 Fed. 238, aff'd 260 Fed. 1022	4
<i>Credit Company Limited v. Arkansas Central Ry. Co.</i> , 128 U. S. 258	8
<i>Janus v. United States</i> , 38 F. (2d) 431	5



	Page
<i>Miami County National Bank v. Bancroft</i> , 121 F. (2) 921	4
<i>Old Nick Williams Co. v. United States</i> , 215 U. S. 541	8
<i>Rees v. Lombard</i> , 21 F. (2d) 270	5
<i>Smith v. Gale</i> , 144 U. S. 509	4
<i>The Lucy</i> , 8 Wall. 307	8
<i>Virginia Ry. Co. v. United States</i> , 272 U. S. 658	15

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

---

**Civil Cause No. 795**

---

**HANCOCK TRUCK LINES, INC.,**

*vs.*

*Plaintiff,*

**UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION,**

*Defendants*

---

**APPELLEE'S STATEMENT AGAINST JURISDICTION  
OF SUPREME COURT AND MOTION TO DISMISS  
OR AFFIRM.**

---

Comes now Hancock Truck Lines, Inc., appellee, and pursuant to paragraph 3 of Rule 12 of the Supreme Court, files with the clerk possessed of the record of the above cause, the following typewritten statement disclosing matters and grounds making against the jurisdiction of the Supreme Court asserted by the appellant, Regular Common Carrier Conference of the American Trucking Associations, Inc., and includes herewith appellee's motion to dismiss, or, in the alternative, to affirm the judgment of the District Court, such statement and motion being as follows:

**Statement**

The judgment of the District Court appealed from herein was entered on May 25, 1944; it was rendered upon the final hearing of the suit brought by appellee against the United

States and the Interstate Commerce Commission to suspend and set aside, in part, an order made by said Commission against appellee; on August 4, 1943, the Commission, in a proceeding then properly pending before it, found and adjudged that appellee's predecessor, Globe Cartage Company, Inc., had been engaged in bona fide operations without interruption, since prior to June 1, 1935, transporting by motor vehicles for compensation, in interstate or foreign commerce, general commodities; that it was a common carrier of such commodities, and "entitled to authority to continue operations as such"; the Commission further found that it was without power to restrict or limit the operations of Globe in a manner which would change its status from that of a common carrier; nevertheless, and notwithstanding such findings of fact by the Commission, it ordered that the certificate authorizing operations by Globe as such common carrier of general commodities should be confined to such general commodities "which are at the time moving on bills of lading of freight forwarders"; appellee succeeded to all of the rights of Globe Cartage Company, Inc., and brought this suit to suspend and set aside that part of the order of the Commission which confined its operations as a common carrier of general commodities to such commodities "which are at the time moving on bills of lading of freight forwarders."

The District Court, properly consisting of three judges, in its decree of May 25, 1944, upon the final hearing of said suit, and upon special findings of fact and conclusions of law properly made, signed and entered therein, suspended, set aside and enjoined the enforcement of that part of said order of the Commission so complained of by appellee; it is from the final hearing of said suit that this appeal has been attempted.

The Regular Common Carrier Conference of the American Trucking Associations Inc. was not a party to the suit

as originally brought by appellee; however, on April 8, 1944, it filed a petition to intervene, and it was granted leave to intervene on that date; it never filed any pleadings of any kind, and never tendered any issue in the case; it never adopted any of the pleadings of any of the parties to the action. Its petition to intervene shows no interest in this proceeding, and it cannot in any manner be affected by the judgment.

#### **Appeal Not Taken in Time**

The petition for this appeal was not filed until July 22, 1944; the appeal was therefore not taken within the time fixed by law; such appeal could only have been taken within thirty days after May 23, 1944; it could not be taken after the expiration of thirty days from May 25, 1944; the Supreme Court therefore has no jurisdiction of this appeal—has no jurisdiction of the parties, or of the subject matter of the appeal, and it can not acquire any jurisdiction herein.

#### **Appeal Not Properly Taken**

The judgment from which the appeal has been attempted was rendered by a statutory three judge court, which can only act by a majority of its members, and the appeal has been acted upon by only one judge of said court.

#### **No Substantial Question Involved**

Appellant, Regular Common Carrier Conference of the American Trucking Associations, Inc., cannot, and has not, shown that the questions involved as to it are substantial; it cannot, and has not, shown that it has any question involved in this appeal; it filed no pleadings, it tendered no issue; it did not adopt any pleading of any other party; as an intervenor, it wholly failed to accompany its original motion to intervene "by a pleading setting forth the claim or defense for which intervention is sought" (Rule 24, Fed-

eral Rules Civil Procedure, clause (c); *Miami County National Bank v. Bancroft* (1941), 121 Fed. (2) 921 (10 C. C. A.).

Its petition to intervene shows no interest whatever in the proceedings; it shows *only* that petitioner is a non-profit corporation, consisting of regular route common carrier members of the American Trucking Associations, Inc., and its purpose is to protect the interests of the regular route common carrier trucking industry through *intelligent cooperation and organization*; many of its members are common carriers engaged in the transportation of general commodities by motor vehicles in the territory covered by appellee, and any operating authority granted to appellee "will place said complainant in competition with and will prejudice the best interests of the members of the intervenor."

It does not appear how the intervenor will be prevented from carrying on its work of *intelligent cooperation and organization* with its members if the judgment is not set aside.

Appellant's petition shows no jurisdictional interest; the decree does not affect it in any manner.

*Smith v. Gale* (1892), 144 U. S. 509;

*Consolidated Gas Co. v. Newton* (1919), 256 Fed. 238 (D. C.); affirmed 260 Fed. 1022; cer. denied 250 U. S. 271.

**Appellant Cannot Present a Substantial Question by Adopting Same Assignment of Error, Petition for Appeal, etc., of Main Defendants.**

The Regular Common Carriers Conference of the American Trucking Associations, Inc., has used the notice of appeal, petition for appeal, order allowing appeal, citation on appeal, jurisdictional statement, assignment of errors, statement relating to paragraph 3 of Rule 12, and copy of



notice to the Attorney General of Indiana, adopted by the United States and Interstate Commerce Commission; even by so doing, it does not have a separate standing which entitles it to an appeal, and its appeal should be dismissed.

*City of Chicago v. Chicago Transit Co.*, 284 U. S. 577;  
*Atlas v. U. S.* (1931), 50 Fed. (2) 808 (3 C. C. A.).

### **Appellant Is Estopped from Claiming Right of Appeal**

Appellant, Regular Common Carrier Conference of the American Trucking Associations, Inc. is estopped from asserting its right to appeal, for the reason that it took the position in the District Court that the time for this appeal had expired and lapsed prior to July 5, 1944, and this appeal was not granted until July 22, 1944.

On July 5, 1944, said appellant directed a letter to each of the judges who decided the case below, and attached thereto a motion, with proper service having been made on appellee, wherein said appellant moved said lower court to set aside said judgment of May 25, 1944, and to re-enter the same as of July 1, 1944, the reason being, as assigned in the motion:

"(5) That the time for taking an appeal from the judgment of this court had elapsed when notice of judgment was received" (July 1, 1944) (See copy of said motion attached hereto as Exhibit A).

Said appellant, having taken the position in the lower court that the time for appeal had expired before July 1, 1944, for the purpose of inducing and moving the lower court to take affirmative action in its favor, cannot now be heard to say that the time for such appeal had not expired. It cannot take an inconsistent position in the court of appeal.

*Rees v. Lombard* (1927), 21 Fed. (2) 276 (9 C. C. A.).  
*Janus v. U. S.* (1930), 38 Fed. (2) 431 (9 C. C. A.).

### Statutory Provisions

The statutory provisions upon which appellee relies to sustain its position that the Supreme Court has no jurisdiction of this appeal are found in Section 47, Title 28, U. S. C. A. (Act of Oct. 22, 1913, c. 32, 38th Stat. 220), which provides as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges asking the order and identified by reference thereto, that such irreparable damage would result to

the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply*" (emphasis supplied).

Appellee contends that the foregoing statute limits the right of appeal in suits brought to suspend and set aside, in whole or in part, an order of the commission, to thirty days from the final hearing, and a petition for such appeal can not be granted by less than a majority of the three-judge court referred to therein. The provisions of Section 792, Title 28, U. S. C. A., do not relate to proceedings after final judgment, as such Act clearly shows that it only authorizes action by a single judge which may be reviewed by all of the judges prior to the final hearing.

#### **Cases Denying Jurisdiction of Supreme Court Where Appeal Not Taken within Statutory Time Allowed**

Where the statutory time for taking an appeal has expired, it cannot be arrested or called back by an order of the court allowing such appeal; the court has no power to allow an appeal after the time limited therefor has expired; the

Supreme Court cannot exercise jurisdiction in an appeal that was not taken within the time prescribed by the statute, as its appellate jurisdiction depends upon the Acts of Congress.

*Credit Company Limited v. Arkansas Central Railway Company* (1888), 128 U. S. 258;

*Old Nick Williams Co. v. United States* (1910), 215 U. S. 541;

*The Lucy* (1868), 8 Wall. 307.

### **Statutory Provisions Relied on by Appellant Do Not Sustain Jurisdiction**

Appellant, in its jurisdictional statement, under the title "A. Statutory Provisions," relies upon:

"U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of Oct. 22, 1913; c. 32, 38 Stat. 220)."

Said *Section 47a, Title 28 U. S. C. A.*, is the only authority cited by appellant bearing upon the question of the time in which the appeal must be taken; its other citations relate to the right of the District Court, and the Supreme Court in a proper appeal, to exercise jurisdiction of the cause of action presented by the complaint.

*Section 47a, Title 28 U. S. C. A.* upon which appellant predicates the jurisdiction for this appeal, was repealed by the Act of Congress of February 13, 1925, c. 229, Section 1, 43 Stat. 938, such Act being as follows:

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise (emphasis supplied).

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money" (includes only cases referred to in Section 47).

"Sec. 13. That the following statutes and parts of statutes be, and they are, repealed;

All other Acts and parts of Acts, insofar as they are embraced within and superseded by this Act or are inconsistent therewith" (43 Stat. 940).

Said Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, is Section 345, Title 28 U. S. C. A., and the annotators have set it up therein as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

(4) So much of Section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

There is no justification for the re-write of section 345, Title 28, U. S. C. A., which the annotators have included as section 345 in the 1943 Supplement to the Code, and wherein they have supplied the reference to section 47a: the original Act of Congress, 43 Stat. 938, must stand, and the appeals referred to in Section 47a are prohibited by said act of February 13, 1925; the right to such appeals having been



abolished, the time fixed for taking such appeals becomes *functus officio*.

From 1925 to 1934, section 47a did not appear in the Code; the fact that it has been improperly resurrected and permitted to linger in the successive editions of the Code is immaterial; the Code cannot prevail over the Statutes at Large where the two are inconsistent, and such inconsistency exists both as to section 47a and section 345 as carried in the 1943 Supplement; *Stephan v. United States* (1943), 319 U. S. 423.

Our position in this regard will more fully appear from a further examination of the history of Sections 47 and 47a.

### **History of Sections 47 and 47a**

Sections 47 and 47a, as printed in Title 28, U. S. C. A., originated from two sources:

a. Section 47 is an amendment of certain provisions of the law which created the Commerce Court (created June 28, 1910, c. 309, Sec. 36, Stat. 639; 36 Stat. 1146-1150; 38 Stat. 219).

b. 47a sets out language taken from Stat. 36, 1150 and from 38 Stat. 220, which was recast by the annotators of the United States Code to express their conception of existing law; it was repealed by the Act of Feb. 13, 1925, c. 229, Sec. 1; 43 Stat. 938 (Sec. 345, Title 28, U. S. C. A.).

### **Commerce Court**

The Commerce Court Act was formerly Chapter 9 of the Judicial Code and consisted of sections 200 to 214. We do not believe it is proper to set out the whole of such Act, but do feel that it is advisable to make the following references thereto; the Act creating such court is very largely set out following subdivision (27) of section 41, Title 28, U. S. C. A.,

on pages 648-651 of the volume containing said subdivision (27).

*Section 207* gave the court its jurisdiction, which, for the purpose of this statement, may be set out as follows:

First: All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money (now subd. 27 of Section 41).

Second: Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission (now subd. 28 of Section 41).

Third: (Related to unjust discrimination; see Title 49, U. S. C. A. Section 43).

Fourth: (Related to mandamus proceedings; see Section 20(e) of Title 49 U. S. C. A.).

*Section 208* is section 46 of Title 28 U. S. C. A. and provides that suits to enjoin, set aside, annul or suspend any order of the Interstate Commission shall be brought in the (district) court against the United States.

*Section 209* is section 45 of Title 28 U. S. C. A. and relates to the invoking of jurisdiction by filing a petition and the giving of thirty days' notice.

*Section 210* is set out in full, because it related to appeals and fixed the time within which such appeals might be taken; it is as follows:

"A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be

transferred on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeal to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court" (36 Stat. 1146-1150).

It should be noted that in the Commerce Court Act an appeal might be taken from a final judgment within sixty days, and from an interlocutory order or decree within thirty days.

### **Commerce Court Abolished**

The Commerce Court was abolished and its jurisdiction was transferred to the District Courts by provisions of the Deficiencies Appropriations Act of October 22, 1913, c. 32, 38 Stat. 219; this transfer of jurisdiction carried over to the district courts the jurisdiction of the Commerce Court in the specific cases referred to hereinabove as being within the jurisdiction of such court, and such specific cases became, and are now, those referred to and included within clauses 27 and 28 of Title 41, U. S. C. A., 27 being, "all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction

of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money"; and 28 being, "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission"; also the cases referred to in Section 43 and Section 20(e), Title 49 U. S. C. A.

When Congress abolished the Commerce Court, it nevertheless preserved the principle that where cases were brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission, more than one judge should sit, and provided that a three-judge court must be convened, and that one member thereof must be a circuit court judge; it required a majority of three judges to concur in any action taken by the court; it also preserved the principle of expediency in such cases, and clearly differentiated between the procedure in ordinary cases arising under clause 27, *supra*, and those arising under sections 43 and 20(e) of Title 49, as against cases arising under clause 28, and set up a special procedure as to cases arising under clause 28, not only as to the hearing before the lower court, but also as to when the appeal must be taken in such special cases, and *expressly limited the time for taking appeals from final judgments in such cases to thirty days.* (Section 47, Title 28, U. S. C. A.)

#### Section 47a

Immediately following that part of the original Act of October 22, 1913, c. 32, 38 Stat. 220, which we have set out on page 4 as Section 47 of Title 28, U. S. C. A., is found that part of such Act which is relied upon by appellant as conferring jurisdiction of this appeal, and it is as follows:

"A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States

if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice shall be served upon the defendants in the case and upon the Attorney General of the State."

Section 47 and that part of 47a just quoted are parts of a single section of the Act of October 22, 1913, c. 32, 38 Stat. 220 aforesaid, which was an Act that abolished the Commerce Court, transferred its jurisdiction to the District Courts, and appeals were provided direct to the Supreme Court in all cases, and that part of the original Act of October 22, 1913, relating to appeals from the District Courts, and which the annotators of the federal code have divided in sections 47 and 47a, reads as follows:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

We submit that said part of said act which is carried as section 47 relates to appeals from cases arising under subdivision (28) of Section 41, Title 28 U. S. C. A., which have been determined by the three-judge court aforesaid.



in cases brought to enjoin, set aside, annul, or suspend, in whole or in part, an order of the Commission; the part which is carried as 47a was, when enacted, intended to have application to all cases heard and determined by a single judge sitting as a district court, but since the Act of February 13, 1925, 43 Stat. 938, *supra*, the time for appeal referred to in section 47a has no application, because such cases cannot be taken direct to the Supreme Court.

The Supreme Court has already recognized that the time for appeal formerly allowed by the Commerce Court Act has been shortened from sixty to thirty days by the Act of October 22, 1913; see *Virginian Ry. Co. v. United States* (1926), 272 U. S. 658, where, in speaking of said Act, it says:

"Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of the writs of injunction in cases of this character by the provisions which require action by the court of three judges, which permit of expediting hearings before the District Court, *which shorten the period of appeal* (emphasis supplied); and which give a direct appeal to this court."

The only time which was shortened by the Act of October 22, 1913, was the reduction of the time for appeal from final hearings from sixty to thirty days.

#### **Appellant Admits That Time for Appeal Expired**

The appellant has heretofore admitted that the time for this appeal had expired before the petition for such appeal was filed; it was not a party to the suit as originally filed by appellee, but it came in with a petition to intervene, and on April 8, 1944, the lower court gave it the right to intervene; as above stated, the judgment was rendered on May 25, 1944; on July 5, 1944, it directed a letter, which

had attached thereto a motion, to each of the judges who heard and decided the case below, with copy served on counsel for appellee, wherein it moved the three-judge court to set aside said judgment of May 25, 1944, and re-enter it as of a later date, the reason assigned being that it had not been notified of the rendition of the judgment until June 30, 1944, and "*the time for taking an appeal from such judgment had then elapsed*" (emphasis supplied).

We thus have the written admission of appellant that our position is correct, and the appeal has not been timely taken.

Inasmuch as the Supreme Court cannot acquire any jurisdiction of this appeal, the appeal should be dismissed, or the judgment should be affirmed.

#### **Motion for Dismissal or for Affirmance of Judgment**

The appellee, Hancock Truck Lines, Inc., now moves the Supreme Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the District Court, for the reason that the Supreme Court has no jurisdiction of this appeal, and cannot acquire any jurisdiction herein.

Dated at Indianapolis, Indiana, this 2nd day of August, 1944.

/ HANCOCK TRUCK LINES, INC.,  
By JACOB WEISS,

8 East Market St., No. 512;

ALBERT WARD,

8 East Market St., No. 318;

FERDINAND BORN,

718 Chamber of Commerce Bldg.,

All of Indianapolis, Indiana,

Its Attorneys.

**EXHIBIT "A"**

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF INDIANA,  
INDIANAPOLIS DIVISION**

Civil Action. File No. 795

**HANCOCK TRUCK LINES, INC., Plaintiff,**

*vs.*

**UNITED STATES AND INTERSTATE COMMERCE COMMISSION,  
Defendants**

**Motion to Set Aside Judgment**

Comes now the Regular Common Carrier Conference of the American Trucking Associations, Inc., and by its attorneys respectfully shows the Court that:

(1) The said Regular Common Carrier Conference of the American Trucking Associations, Inc., was granted the right to intervene in the above cause by this Court;

(2) That the said intervenor appeared by its counsel in said cause, participated in the hearing of said cause and filed briefs herein;

(3) That the said intervenor was duly notified by mail by the Clerk of this Court of the dates on which hearings would be held;

(4) That the said intervenor and its attorneys, being unfamiliar with the Rule of this Court respecting the appointment of counsel resident in the County wherein the judge of this Court is holding Court (Section (d), Rule 1 of the Rules of the District Court of the United States for the Southern District of Indiana) and relying upon the practice heretofore followed in the case of Ziffrin, Inc. v. United States and Interstate Commerce Commission, No. 418 Civil by the Clerk of this Court of mailing notices of orders and judgments entered, was unaware of the entry of judgment herein on the 25th day of May, 1944, and had no notice of

same until the 1st day of July, 1944, when one of its counsel received answer to his inquiry of June 30, 1944 directed to the Clerk of this Court; as per the attached Exhibits A and B, same being copies of the correspondence above referred to.

(5) That the time for taking an appeal from the judgment of this Court had elapsed when notice of judgment was received.

WHEREFORE, intervenor, by its counsel, respectfully petitions that this Court make and enter its order setting aside its judgment of May 23, 1944, and re-enter same as of July 1, 1944.

REGULAR COMMON CARRIER CONFERENCE  
OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,

By ———, *1515 Paul Brown Building,  
St. Louis 1, Missouri.*

HOWELL ELLIS,  
*520 Illinois Building,  
Indianapolis, Indiana,  
Resident Counsel.*







**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**MAR 15 1945**

**CHARLES ELMORE DINGLEY**  
CLERK

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 449**

**REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN  
TRUCKING ASSOCIATIONS, INC.**

*Appellant;*

**v.**

**HANCOCK TRUCK LINES, INC.,**

*Appellee.*

**ON APPEAL FROM A THREE JUDGE COURT OF  
THE UNITED STATES, FOR THE SOUTHERN  
DISTRICT OF INDIANA**

**BRIEF FOR APPELLEE**

**JACOB WEISS,**  
8 East Market St., No. 512,

**ALBERT WARD,**  
8 East Market St., No. 318,

**FERDINAND BORN,**  
718 Chamber of Commerce  
Building,

All of Indianapolis, Indiana,

*Attorneys for Appellee.*



# INDEX

	Page
Jurisdiction.....	1-3
Corrected Statement of the Case.....	3-11
Specification of Assigned Errors Intended to be Urged .....	12-13
Summary of Argument.....	14-19
Argument on Jurisdiction.....	19-20
Granting of Appeal by Single Judge.....	20-24
Granting Appeal After Time Expired.....	24-26
Argument on the Merits.....	26-27
Question Actually Presented.....	27
Order of May 16, 1942.....	27-33
Estoppel Against Commission.....	33-35
Part of Commission's Order Complained of Violates Fifth Amendment.....	35-40
Part of Commission's Order Complained of Violates Section 206 (a).....	40-42
Part of Commission's Order Complained of Is Violative of Section 216 (d).....	42
Void Part of Commission's Order Complained of Is Capricious .....	43
Voir Part of Commission's Order Complained of Is Unreasonable .....	44-45
Judgment of District Court Is Not Violative of Commission's Administrative Functions.....	45-46
Remand Is Not Proper Remedy.....	46-48

	<i>Page</i>
Waiver .....	48-51
Commission Did Not Find That Globe Was Not Holding Itself Out to Transport Property for All Shippers .....	51-53
Substantial Parity .....	53-55
Finding No. 14 .....	55-56
Findings Nos. 15, 16, 17, and 18 .....	56
Court Below Did Not Exceed Its Jurisdiction .....	56-58
Conclusion .....	59



## CITATIONS

	<i>Page</i>
Atles v. U. S., 50 Fed. (2d) 808.....	14-20
Attorney General v. Societi Suisse etc., 85 Fed. (2d) 287 .....	34
Bartemeyer v. Iowa, 14 Wall. 26.....	23
Bowerman v. Detroit Free Press, 287 Mich. 443.....	51
Chicago M. St. P. & P. R. Co., 282 U. S. 311.....	46-48
City of Chicago v. Chicago Rapid Transit Co., 284 U. S. 572.....	14-20
City of Ironton v. Harrison Const. Co., 312 Fed. 353.....	49
Credit Co. v. Ark Central Railway, 128 U. S. 258.....	22
Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm., 260 U. S. 212.....	23
Covington Stock Yards Co. v. Keith, 139 U. S. 128.....	55
Ex Parte Metropolitan Water Co., 220 U. S. 539.....	21
Hasler v. West India, 212 Fed. 862.....	50
Hodges v. Easton, 106 U. S. 408.....	49
Hunter Milling Co. v. Koch, 82 Fed. (2d) 735.....	50
Lynch v. United States, 292 U. S. 571.....	40
McClellan Trucking Co. v. United States, 321 U. S. 67.....	37
New State Ice Co. v. Liebman, 285 U. S. 262.....	55
O'Leary v. Liggett Drug Co., 53 Fed. Supp. 288.....	13
Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., 27 Fed. Supp. 86.....	13
Pittsburg & W. Ry. Co. v. United States, 281 U. S. 479 .....	3
Smith v. Wilson, 273 U. S. 388.....	25
St. Paul Fire & Marine Ins. Co. v. Tire Clearing House, 58 Fed. (2d) 610.....	13

# CITATIONS—Continued.

	<i>Page</i>
State of Iowa v. Carr, 191 Fed. 257.....	18-33
Town of St. John v. Gerlach, 197 Ind. 289.....	49
United States v. Carolina Freight Carriers, 315 U. S. 475.....	19-47-53
United States v. City & County, etc., 310 U. S. 16....	34
United States v. Maher, 307 U. S. 148.....	41
United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311.....	46-48
United States v. Stinson, 197 U. S. 200.....	17-33
United States v. Denver, 16 Fed. (2d) 374.....	18-33
Utah Power & Light Co. v. United States, 243 U. S. 389.....	34
Victor Products Corp. v. Yates, 54 Fed. (2d) 1062....	50
Walker v. United States, 139 Fed. 409.....	17-33
<b>Interstate Commerce Act</b>	
Section 5 (2) (9), Part I, Section 5, Title 49, U. S. C. A.....	6-15, 17, 35-36-37
Section 17 (9), Part I.....	2
Section 203 (14), Part II, Section 303, Title 49, U. S. C. A.....	52
Section 206, Part II, 306 Title 49, U. S. C. A.....	2, 4, 10, 16, 17, 18, 27, 35, 36, 39, 40, 41, 46, 55
Section 208, Part II, 308 Title 49, U. S. C. A.	18-55-57
Section 216 (a) (d) Part II, 316 Title 49, U. S. C. A.....	16-17, 42, 48, 55
<b>Fifth Amendment to the Constitution</b>	
	11, 13, 16, 17, 35, 37, 38, 40, 48
<b>Rules of This Court</b>	
Rule 7 (3).....	14
Rule 12 (3).....	20-21
Rule 27 (2c) (7).....	14-20
Rule 52 Federal Rules of Civil Procedure.....	2-12

# CITATIONS—Continued

Page

## Miscellaneous

Urgent Deficiencies Act, Oct. 22, 1913, Sec. 47,	
Title 28, U. S. C. A.....	2, 14, 15, 21, 25
Section 47 <sup>a</sup> , Title 28, U. S. C. A.....	2, 21, 25
Act of April 6, 1942, 56 Stat. 199.....	22
Act of Feb. 13, 1925, 43 Stat. 936.....	25

## Judicial Code

Section 266 .....	21-25
R. C. L. Vol. 27, Sec. 5, p. 908.....	50



IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1944

No. 449

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN  
TRUCKING ASSOCIATIONS, INC.

*Appellant,*

v.

HANCOCK TRUCK LINES, INC.,

*Appellee.*

ON APPEAL FROM A THREE JUDGE COURT OF  
THE UNITED STATES, FOR THE SOUTHERN  
DISTRICT OF INDIANA

**BRIEF FOR APPELLEE**

**JURISDICTION**

Appellee filed its verified complaint in the Indianapolis Division of the District Court of the United States for the Southern District of Indiana, on March 29, 1944, to set aside, in part, an order made by the Interstate Commerce



Commission; Judge Baltzell, the District Judge, immediately called to his assistance to hear and determine the application two other Judges; the trial court, when assembled, consisted of Honorable Sherman Minton, of the Seventh Circuit Court of Appeals, Honorable Luther M. Swygert, of the Northern District of Indiana, and Honorable Robert C. Baltzell, of the Southern District of Indiana (R. 53); the court acted with expediency; the evidence was heard on April 8 (R. 89); the case was orally argued on April 28 (R. 65); findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure, were signed and filed on May 25, 1944 (R. 65), and the final decree was entered on May 25, 1944 (R. 74). The petition for appeal was not filed until July 22, 1944.

The jurisdiction of this Court is denied by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, Section 47, Title 28 U.S.C.A. Under such Act, the appeal had to be taken within thirty days after May 25, 1944, and the appeal had to be presented to, and acted upon, by the statutory three judge court which tried the cause.

In addition to the foregoing reasons, this appellant has no standing in this Court, because it is not "an aggrieved party" within the meaning of Section 47-a upon which it relies for jurisdiction; it filed no pleadings below, except its petition to intervene; it tendered no issue; it adopted none of the pleadings which were filed by the parties to the litigation. It is not a party to the judgment (R. 74); its mere appearance before the Interstate Commerce Commission did not authorize it to thereafter appear in either the District Court or this Court; Section 17 (9), of Part I of the Interstate Commerce Act gives it no right to appear in an action and has no bearing on this appeal; consequently,

no substantial question is presented by its appeal. *Pittsburgh & W. Ry. Co. v. United States* (1930), 281 U. S. 479.

Nor has appellant made any explanation of the position adopted by it in the lower court, that its time for appeal had expired before July 1, 1944.

These questions are presented by appellee's Statement Opposing Jurisdiction of this Court, filed on August 2, 1944, and which has been separately bound as a part of the record in this appeal.

### **CORRECTED STATEMENT OF THE CASE**

The failure of appellant to make a concise statement containing all that is material to the consideration of the questions presented, will necessitate the making of a corrected statement by appellee, and such corrected statement, taken largely from the findings of fact, found in the Record between pages 65 and 73, is as follows:

On or about the 29th day of January, 1936, Globe Cartage Company, Inc., filed its written application with the Commission under the grandfather clause of Section 206, Part II of the Interstate Commerce Act, Section 306, Title 49 U. S. C. A., duly alleging that it was in fact in bona fide operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which such application was made by it, and had so operated since that time down to the filing of its application; such application was numbered MC-3339, was designated as application of Globe Cartage Company, Inc., Common Carrier Application, and after the rights of Globe were taken over by appellee as hereinafter shown, it was designated by the Commission as No. MC-25567 (Sub. No. 8), Hancock Truck

Lines, Inc., successor to Globe Cartage Company, Inc.; therein it requested the Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by it to the Commission in all respects as provided for in Paragraph (b) of Section 206, of Part II of the Interstate Commerce Act aforesaid, and within 120 days after October 1, 1935 (R. 66-67).

• While said application of Globe Cartage Company, Inc., was thus pending before the Commission, the Hancock Truck Lines, Inc., and said Globe Cartage Company, Inc., filed and presented to the Commission their joint application asking an authorization for the purchase by the Hancock Truck Lines, Inc., of all of the common carrier operating rights of Globe which were involved in said application; a hearing was had and a finding and order were made by the Commission on May 16, 1942, authorizing such purchase; when said joint application was first filed, Hancock had only paid Globe \$100 on the purchase price, but had agreed to pay an additional \$2,500 upon approval of such transaction by the Commission, \$2,500 upon final approval by the last concerned State regulatory authorities, and \$4,900 within ten days thereafter; as a justification for such authorization order, the Commission found that approximately 65% of Globe's traffic consisted of business handled for Universal Carloading and Distributing Company, a freight forwarding company, and as a result of handling such business the flow of traffic for Globe was unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it found, on the other hand, that Hancock enjoyed heavier traffic east out of St. Louis than in the reverse direction; the Commission found that, with some exceptions not material herein, Hancock's regu-

lar route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive; both carriers were found to be serving Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago; among other points, and maintained duplicate terminal facilities at a number of such common points; Globe did not believe that it would be justified in expending additional funds to develop a better balanced operation, and, as its functions and facilities substantially duplicated those of Hancock, the desired result could be accomplished through the unification of the operations in Hancock; the Commission found that such unification would result in better balanced lading between the common points served, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, and would provide Hancock with shorter routes; Hancock was found to have the necessary organization to conduct the additional operations and it would meet any increased equipment demands, either by leasing or purchasing the same; the Commission found that savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually, approximately \$20,000 of which represented the estimated cost to Globe, if it remained in operation, in developing additional business to balance its present lading; the Commission found that the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation.

The Commission further found that the purchase by Hancock of the common carrier operating rights of Globe,

upon the terms and conditions set out in the order, which terms and conditions were found by the Commission to be just and reasonable, was a transaction within the scope of Section 5 (2) (a), Part I of the Interstate Commerce Act, and would be consistent with the public interest, and, pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should conduct the common-carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and Hancock would be entitled to a certificate covering any "grandfather" common carrier rights which might be confirmed as a result of those applications, which rights the Commission, by its said order of May 16, 1942, authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; an order was thereupon entered by the Commission conforming to such findings (R. 70-71-72); such order is specifically referred to in paragraphs 13 and 18 of appellee's complaint (R. 5, 8, 9), and the order is set out on pages 99 to 105 of the Record.

Throughout the period of appellee's corporate existence, it has been a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign commerce of general commodities, with certain usual exceptions, for compensation, and it has been the holder of certain certificates of public convenience and necessity issued to it by the Commission, different from the certificate and order of the Commission complained of in the complaint (R. 66).

In reliance upon said findings and order of May 16, 1942, the appellee completely unified the common carrier operating rights of Globe which were to be confirmed by



the Commission as the result of its grandfather applications as aforesaid, with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission, and it thereafter continued to operate under said order of unification up to the time of the trial and to the extent and in the manner as set out in Paragraph 18 of its complaint (R. 72).

Following the findings and order of the Commission of May 16, 1942, appellee, in reliance upon such findings and order, paid to Globe said \$9,200 as the balance of the purchase price for such common carrier operating rights (R. 72).

The proceedings in Cause No. MC-3339 of Globe Cartage Company, Inc., Common Carrier Application, remained pending before the Commission until as of August 4, 1943; on which date the Commission found as a fact that Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e., freight and commodities of every class, type and character), except commodities in bulk and those of unusual length, height or weight; it further found as a fact that Globe Cartage Company, Inc., was a common carrier by motor vehicle, and further found that the Commission could not, consistently with Globe's common carrier status, restrict its services to particular shippers; the Commission further found as a fact that Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that the Commission was without

power to restrict or limit its operations in a manner which would change its status from that of a common carrier (R. 68).

Contrary to such findings of the Commission, it did place restrictions in said order of August 4, 1943, and therein limited the transportation to be performed in the future by appellee to those general commodities which are at the time moving on bills of lading of freight forwarders (R. 68-69).

A petition to modify the effective date of the order was filed, but the order became a final one as of March 31, 1944 (R. 69).

All of the common carrier operating rights of Globe Cartage Company, Inc., in said cause No. MC-3339 were acquired by appellee, under and pursuant to the order of the Commission on May 16, 1942, and appellee is the sole party in interest and will be the sole owner of such certificate as is issued in said proceeding (R. 69).

The appellee, as such common carrier of property by motor vehicles, has, and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and enforced just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate and foreign commerce, and has fully complied with all the rules and regulations of the Commission in relation thereto insofar as they are in effect

at this time, and as such common carrier it is prohibited by law from making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district, territory, or description of traffic, in any respect whatsoever, and as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates (R. 70).

If that part of the order complained of by the appellee is enforced, all of the business which appellee has built up under said unification order of May 16, 1942, will be destroyed, and appellee will be put back to the position which Globe was in when said order was entered, namely, maintaining duplications in terminals and facilities, handling an unbalanced lading, dead-heading of equipment, its savings in excess of \$50,000 per year through consolidation of overlapping functions, including terminal and pick-up delivery facilities, reduction in truck miles operated, and the use of vehicles operated by transporting heavier loads, will all be lost to it, and it will suffer and sustain immediate and irreparable injury, loss and damage on account of the enforcement of the part of said order complained of herein (R. 72).

The Commission made no finding that the restriction complained of by the appellee is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it would be consistent with the public interest and just and reasonable to place such restriction in said order; nor has it found that good cause exists for changing its said order of May 16, 1942 (R. 73); that part of the order complained of by appellee herein is not sustained or justified by any

fact found by the Commission, and there is no rational basis for its support; said part of the order is discriminatory against the appellee and is an arbitrary, unreasonable, and capricious restriction upon the rights, duties and privileges of appellee as a common carrier of general commodities by motor vehicle for compensation, and will deprive appellee of its rights and property without due process of law (R. 73):

For convenience, we set out at this point the Commission's order of August 4, 1943, insofar as it affects our question, and have italicized the particular words complained of in this action:

"On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk or those of unusual length, height or weight) *which are at the time moving on bills of lading of freight forwarders*, between the points and in the manner described in the findings in the prior reports" (R. 45).

(The order affects an additional carrier whose application is covered thereby, and who is not involved herein.)

Appellee brought this suit to set aside the italicized part of said order, alleging, in substance, that: inasmuch as the Commission had found as a fact that appellee was a common carrier of general commodities by motor vehicle as defined by the grandfather clause of the Interstate Commerce Act, it was then the statutory duty of the Commission to issue to it a certificate, "without further proceedings" as expressly provided for by Section 206 (a) which says that

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by

motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

That the inclusion of said limitation in said order is an unlawful and illegal restriction against and constraint upon appellee, not authorized by law, and is an unjust, unreasonable, and capricious limitation upon its rights, privileges and duties as a common carrier of general commodities by motor vehicle, and will deprive appellee of its rights and property without due process of law and in violation of the Constitution of the United States and the Fifth Amendment thereto; such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against appellee as a common carrier by motor vehicles, and is contrary to public policy (R. 1-11).

Upon appropriate special findings of fact (R. 65-73), the trial court stated its conclusions of law as follows:

"One. The Court has jurisdiction of the subject matter, and of the parties, in this cause of action.

"Two. That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those which are at the time moving on bills of lading of freight forwarders is illegal and void, and the defendants should be permanently enjoined from enforcing the same" (R. 73).

- In conformity with such conclusions, the final decree appealed from herein was entered on May 25, 1944 (R. 74).



## **SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED**

On page 10 of appellant's brief it is said that it will urge certain errors assigned by it, the first one being: the court erred,

"In not dismissing plaintiff's complaint".

There is no further discussion of this assignment, and we fail to find anything in the record which shows that appellant in any manner presented this question to the lower court. Alleged error No. 4 is:

"In refusing to adopt the findings of fact and conclusions of law submitted by the defendants".

We do not understand that appellant claims it submitted any findings or conclusions of law; the reference which it makes to the Record on pages 146 and 147 has application only to findings and conclusions submitted by the defendants United States and Interstate Commerce Commission.

These claimed errors properly illustrate our position that a stranger to the judgment should not be permitted to appeal and urge questions in this Court with which it had no concern in the lower court.

Alleged error 16, page 12, that the court erred in failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree, is not argued nor supported by any authority. Findings of fact and conclusions of law were signed and filed (R. 65-73), pursuant to Rule 52, Federal Rules of Civil Procedure, and it seems clear therefrom that the final decree of the court was based upon its conclusion of law that the restriction complained of in the order is illegal and void,

and both the conclusions of law and the decree are supported by findings of fact which show that the Commission's order will deprive appellee of its property without due process of law.

A written opinion is not required of the lower court, either by any Rule, or by law; as stated by Judge Woolsey in *Penmac Corp. v. Esterbrook Steel Pen Mfg. Co.*, D. C. (1943), 27 Fed. Supp. 86-87:

"It is now a work of supererogation to write a considered and detailed opinion on the facts in what used to be an equity cause and is now called a non-jury cause, for the place of the opinion must now be taken by the formal findings of fact and conclusions of law, separately stated and numbered."

See also District Judge Nevin's Opinion in *O'Leary v. Liggett Drug Co.* (1943), (S. D. Ohio), 53 Fed. Supp. 288; *St. Paul Fire & Marine Ins. Co. v. Tire Clearing House* (1932), 58 Fed. (2), 610 (8 C. C. A.).

Alleged error 17, on page 12, of appellant's brief complains of the court's finding of fact No. 2, which states, among other things, that appellee's action arose under the Fifth Amendment; it is difficult to see how this injured appellant in any manner, as it admits on page 2 of its brief that

"This action arises under the Fifth Amendment to the Constitution of the United States", etc.

Other errors assigned will be discussed later in this brief, following the points outlined in Appellant's Summary of Argument, but we should state here that all of the remaining ones depend for their vitality upon getting the Court to disregard the Commission's Order of May 16, 1942, as suggested in alleged error No. 8, page 11, of its brief.

## SUMMARY OF ARGUMENT

1. Appellant has not shown that it was a party to the judgment below; nor that it filed any pleadings or tendered any issue in the trial court; it therefore has no standing in this Court, and its appeal should be dismissed.

*City of Chicago v. Chicago Rapid Transit Co.*  
(1931), 284 U. S. 577;

*Atlas v. U. S.* (1931), 50 Fed. (2) 808 (3 C. C. A.).

2. Appellant has wholly failed to present, argue, or discuss the jurisdictional question raised by our Statement Opposing Jurisdiction, and it has thereby waived its right to have this appeal considered on the merits.

Rule 7 (3);

Rule 27 (2-c) (7).

3. This appeal was not taken within the time prescribed by statute; the judgment was rendered on May 25th and the petition for appeal was not filed until July 22, 1944 (R. 74); it had to be taken within 30 days from the date of final judgment; that part of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, Section 47, Title 28 U.S.C.A., under which this case was tried, and which has direct application to this question, provides as follows:

“An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges

*and the same procedure as to expedition and appeal shall apply"* (emphasis supplied).

4. A single judge of the statutory three judge court which was assembled to hear and determine this cause could not act upon or grant a petition for an appeal; said Section 47 provides that no injunction shall issue against any order of the Commission,

"Unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges".

5. The Commission, having authorized the unification of appellee's operating rights with those of Globe, by its finding and order of May 16, 1942, could not revoke, change or set aside such unification order without notice to appellee, and a finding that the proposed change is "consistent with the public interest", is "just and reasonable"; and that good cause has been shown for such change; this restriction upon the Commission is found in clause (9), Section 5 of the Interstate Commerce Act, which provides that:

"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate".

The Commission made no finding that good cause existed for changing said order of May 16, 1942 (R. 73).

The restriction in the order complained of by appellee, having been made without notice, and without a hearing, is violative of the Fifth Amendment.

(The following points relate specifically to appellant's summary of argument, pages 13-14 of its brief; its numbers being in parenthesis.)

6. (1) The facts of record before the Interstate Commerce Commission in application of Globe Cartage Company, Inc., Docket No. M. C. 3339, fully sustained the *findings made by the Commission* that Globe was a common carrier on June 1, 1935, within the provisions of the grandfather clause of Section 206 of the Interstate Commerce Act, Section 306, Title 49, but *the facts found do not sustain the order made by the Commission.*

The Commission, having found that Globe was a common carrier, the limitation in the order of appellee's operations to the transportation of general commodities moving on bills of lading of freight forwarders, is an unlawful restriction of the duties and rights of appellee as a common carrier of such general commodities, and a violation of Section 206 and 216 (a) (d), Part II, Interstate Commerce Act, Section 206, 316, 49 U.S.C.A.

7. (2) The findings and order of Division 4 in the consolidation proceedings between Globe and appellee, in Cause M. C.-F.-1743, were adopted as the findings of the Commission, and upon such findings the Commission predicated its order of May 16, 1942 (R. 104); the Commission, having expressly authorized the consolidation of appellee's then existing common carrier rights, under other certificates then held by it, with the common carrier rights held by Globe in Cause No. M.C. 3339, and having required such joint operation to be carried on by appellee from May 16,



1942, to August 3, 1943, thereby created and established certain vested property rights in appellee which cannot be taken away from it by the present order entered in a collateral proceeding, limiting its transportation of general commodities to such only as are moving on bills of lading of freight forwarders; such part of the order complained of will take appellee's property without due process of law, in violation of the Fifth Amendment, and is a violation of Sections 206 and 216 (a) (d), Part II of the Interstate Commerce Act, Sections 306 and 316 (a) (d) of Title 49; U.S.C.A.

8. (a) The Commission's order of May 16, 1942, was entered pursuant to Section 5 of the Interstate Commerce Act, and therein the Commission determined that the question of consolidating the common carrier rights of Globe with the common carrier rights of appellee was "consistent with the public interest"; it found that "the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation", and that the "terms and conditions were found to be just and reasonable"; rights so created by an order entered pursuant to Section 5 cannot be taken away from appellee and destroyed by the Commission pursuant to Section 206 (a); such procedure would violate the provisions of the Fifth Amendment, be clearly contrary to the express provisions of Section 206 (a), and be violative of Section 5.

9. (b) The Commission is bound by the same rules of estoppel which control individuals, and the rights of the parties must be determined upon the fixed principles of justice which govern between man and man in like situations: *United States v. Stinson* (1905), 197 U. S. 200; *Walker v. U. S.* (1905), 139 Fed. 409; *U. S. v. Denver*

(1926), 16 Fed. (2) 374 (8.C.C.A.); *State of Iowa v. Carr* (1914), 191 Fed. 257 (8 C. C. A.).

10. (3) The Commission had neither power nor authority under Section 206 (a), Part II of the Interstate Commerce Act, to limit appellee's operating authority as a common carrier by Motor vehicle to transportation of general commodities "which are at the time moving on bills of lading of freight forwarders"; having found, as it did, that appellee's predecessor Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i.e. freight and commodities of every class, type and character), and that it was a common carrier by motor vehicle (R. 68), the statute then expressly provided that

"the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings". Section 206, supra; Section 306, Title 49 U.S.C.A.

11. (4) The Commission had no power or authority to limit the operations of appellee (a common carrier—not a contract carrier) to the transportation of general commodities moving on bills of lading of freight forwarders, unless it found as a fact that such limitation was reasonable and was required by the public convenience and necessity; Section 208, Part II of Interstate Commerce Act; Section 308, Title 49 U.S.C.A. The Commission did not find that such limitation was reasonable, or required by the public convenience and necessity (R. 73); it could not make such finding under section 206 (a), which provides that if the Commission finds the applicant was bona fide

engaged as a common carrier, a certificate must be issued "without further proceedings".

12. (4) The Court below did not substitute its judgment for that of the Commission:

(a) There was no suggestion in the lower court that the proceedings should be remanded to the Commission; such procedure was wholly unnecessary and clearly improper; the Court could and did strike out the void part of the order complained of, and the Commission could have done no more.

(b) The lower court did not make findings of fact contrary to the record made before the Commission; the court did properly conclude that the Commission had erred in its application of the law to the undisputed facts.

13. The attempt of the Commission to freeze appellee to the transportation of general commodities which are moving on bills of lading of freight forwarders, alters very materially the basic characteristics of the service which appellee has been rendering (that of a common carrier) since the unification Order of the Commission of May 16, 1942, arbitrarily confiscates its property without due process of law, without the basis or essential findings of convenience and necessity therefor, and is a gross violation of appellee's constitutional and statutory rights.

*United States v. Carolina Freight Carriers Corp.*  
(1942), 315 U. S. 475.

### ARGUMENT ON JURISDICTION

We have not been able to distinguish the present appeal from that of *City of Chicago v. Chicago Rapid Transit Co.*,

284 U. S. 577, where this Court dismissed a separate appeal taken by the City of Chicago, because it had no separate standing which gave it any right to appeal. Here, as there, the appeal is separate.

Nor do we think a stranger to the judgment below has any right to appeal; especially, where such stranger wholly fails to show that it filed any pleadings, or tendered any issue in the court below, and has not shown that it was recognized as a party to the proceedings in the court below. An appellant against whom no decree was entered, and who is not shown to have any interest, has no standing on appeal. *Atlas, et al. v. United States* (1931), 50 Fed. (2) 808 (3 C.C.A.).

Appellant has waived its right to be heard in this cause; our Statement Opposing Jurisdiction in this Court was filed on August 2, 1944; no answer has ever been made thereto by this appellant, although Rule 7 (3) clearly contemplates that when a jurisdictional question is presented as provided by Rule 12, paragraph 3, the appellant shall file a brief opposing the same; Rule 27 (2-c) contemplates a concise statement on which the jurisdiction of this Court is invoked; the mere reference to apparent conflicting statutes bearing upon such jurisdiction does not satisfy the Rules of this Court; under Rule 27 (7), the appellant, being in default, the Court should decline to consider its appeal, and the judgment should be affirmed.

#### **GRANTING OF APPEAL BY SINGLE JUDGE**

We deem it unnecessary to set out herein any of the matters appearing in appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, which was filed

pursuant to paragraph 3 of Rule 12; the statement has been separately printed and we understand it to be a part of the record; we respectfully urge that our position is well founded and believe this Court has no jurisdiction of this appeal.

Appellant has not seen fit to touch upon the jurisdictional questions presented by appellee; it has made no response to the implied invitation of this Court for a further discussion of this matter by its order of November 6, 1944; the mere reference on page 2 of its brief to Sections 47 and 47-a as sustaining the jurisdiction of this Court, is not a sufficient showing to justify this Court in assuming jurisdiction of appellee, in view of its jurisdictional statement.

Section 47 is a law of restriction and limitation upon the powers of a single district judge; it is a grant of power to three judges; whatever power a single judge has under this statute, must be found in the statute itself; if no rights are granted to a sole judge under the Act, then he can perform no acts alone.

Our position in this regard is justified by the reasoning and decision of this Court in *Ex Parte Metropolitan Water Co.* (1911), 220 U. S. 539, where the Court considered the effect of Section 266 of the Judicial Code, which creates a three judge court to hear suits to enjoin state statutes; true, the question there arose upon the granting of a temporary injunction, but, nevertheless, the Court very carefully pointed out that suits of this character should be heard before a court consisting of three judges, and not one judge alone, and that limitations are unequivocally placed upon the power of the single judge to act, and a single judge of a special statutory three judge court has no power to do any act which is not expressly given him by the act creating such court.



Congress recognized the propriety of such position when it passed the Act of April 6, 1942, 56 Stat. 199, expressly providing that a single judge might do certain acts, and specifically designated such acts, and very clearly provided that all such acts must be those which should be subject to review at any time prior to final hearing by the three judge court; it failed to give a single judge any power to act on matters occurring at, or subsequent to the final hearing; Congress, having legislated expressly upon the subject, after this Court had pointed out that authority for acts of a single judge must be found within the statute itself, and having failed to give a single judge any power to act subsequent to final judgment, it must be presumed that it did not intend to give a single judge any such power subsequent to final judgment.

We concede that the lower court could not sit in judgment on its own alleged errors, and deny an appeal because it thought there was no merit in the errors assigned, and to such extent it may be properly argued that the appeal was a matter of right. But this does not reach our question; this petition for appeal was not presented within the time fixed by law; *it was not presented until after appellant had filed a petition in the lower court asking the court to vacate its judgment of May 25th and render a new judgment of a later date so it could take an appeal within the time prescribed by the statute; it was allowed by a single judge; these matters are judicial questions, and must be decided by the Court that tried the case.*

In *Credit Co. v. Ark. Central Railway* (1888), 128 U. S. 258, it is said that:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the

court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court".

If the single judge had the right to grant the appeal, and decide that the appeal was taken in time, such act deprived the three judge court of its further jurisdiction; thereafter, the three judge court would have been denied the right to pass upon the question presented of vacating the judgment and re-entering it as of a new date.

Again, we refer to the decision upon this question as it relates to Section 266, Judicial Code, in *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.* (1922), 260 U. S. 212, where the court says:

"We are of opinion that a single judge has no power, in view of Section 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid \* \* \*. This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration."

The Court further suggested that in cases of this character, the proceedings are special, "in which the power of a single judge is definitely limited".

In *Bartemeyer v. Iowa* (1871), 14 Wall. 26, this Court held that a writ of error signed by an associate justice of the Supreme Court of Iowa, composed of a chief Justice and three associates, was not sufficient to give the Court

jurisdiction of the cause; the Court differentiated between a court composed of a single judge and one composed of more than one judge.

*We think it will lead to confusion for this Court to hold that a single judge of a statutory three judge court can grant a petition for appeal, and thus oust the trial court of further jurisdiction, and cut off the right of three judges to pass upon the many questions which are apt to arise following the final judgment.*

#### GRANTING OF APPEAL AFTER EXPIRATION OF STATUTORY TIME

The matter of appeal is governed by a very short paragraph in Section 47 reading as follows:

*"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying after notice and hearing; an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply" (emphasis supplied).*

This is a statute of limitation upon the powers of a single judge, and upon the acts and conduct of the parties; the final hearing must be by three judges, and the same haste is required as to trial and appeal as is provided for in relation to the interlocutory injunction; appellant would have the Court read out of the state the words "the same requirement as to judges and the same procedure as to expedition and appeal shall apply"; it would strike down the command of Congress that where the Commission's

order has been finally set aside, the appeal must be taken in 30 days; appellant is not only compelled to strike out such quoted words from Section 47, but it is obliged to resurrect and rewrite Section 47-a, because it was repealed by the passage of the Act of February 13, 1925, 43 Stat. 936; resurrection was not deemed adequate; a re-write was necessary, and the words "in the cases specified in section 44 of this title" (28) were inserted, *not by Congress*, but apparently by the annotators of the code; we most earnestly urge that this repealed Act (47-a) cannot be thus revived and re-written by Code annotators, and then used in this Court to thwart the express mandate of Congress that appeals of this character must be taken in 30 days.

In *Smith v. Wilson* (1927), 273 U. S. 388, this Court held that the repealing Act of February 13, 1925, 43 Stat. 938, cited and relied upon by appellee above, and on page 6 of its Statement Opposing Jurisdiction, was so broad that a special amendment to Section 266 of the Judicial Code was necessary to save and provide for appeals direct to this Court under said section.

That our position in this regard is sound, is further clearly evidenced by the declarations and conduct of the appellant below; with due deliberation, it went into the lower court on July 5, 1944, and filed its petition, sending a copy thereof to each of the three judges (Statement 17), and asked them to set aside their judgment of May 25, and re-enter it as of July 1, the only reason assigned being,

"(5) That the time for taking an appeal from the judgment of this Court had elapsed when notice of judgment was received" (which was July 1, 1944). (See Statement 17-18.)

This particular appellant had failed to appoint counsel resident in Marión County, as required by a local court rule,

and claimed it was not notified of the lower court's judgment until July 1 (Statement 15); *it was then reading the appeal statute the same as appellee; it then understood the appellate provisions of the law the same as appellee understands them*; in fact, in so far as we know, it is still of the same opinion.

Judging from the only constructive declaration it has made upon the question of jurisdiction, it will have to be aligned with appellee in asserting that the time for appeal had expired, because, although jurisdiction has been challenged ever since August 2, 1944, and this Court, on November 6, 1944, was especially considerate and postponed the decision of the question of jurisdiction to the hearing on the merits, undoubtedly to give the parties further opportunity to brief the question, yet, this appellant has never explained why it went into the lower court on July 5th and tried to convince the three judges that the time for appeal had then expired; this Court is now confronted with the very unusual and anomalous situation of two appellants appealing from the same judgment, one claiming in Cause 448 that the appeal was taken in due time, and the appellant herein having claimed in the lower court that the time for appeal had expired, and now offering no explanation to this Court for such position.

### **ARGUMENT ON THE MERITS**

If the Court concludes to pass upon the merits of this appeal, then it becomes necessary to consider appellee's statement of the questions actually presented; appellant does not present the case that was tried below, nor state the question which must be decided in this appeal.



### QUESTION ACTUALLY PRESENTED

The Commission found as a fact that Globe was in bona fide operation as a common carrier by motor vehicle since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities of every class, type and character (with certain exceptions as to bulk, etc.), within the provisions of the grandfather clause, Section 206 (a), Part II of the Interstate Commerce Act; *having made such finding, it thereupon became the mandatory duty of the Commission to grant appellee, as Globe's successor, an unlimited certificate of convenience and necessity under Section 206 "without further proceedings"; failing so to do, the Commission has clearly misapplied the law to the facts found by it.*

In addition, there are very cogent legal and equitable reasons, arising from and growing out of the order made by the Commission on May 16, 1942, which impel the affirmance of this judgment.

### ORDER OF MAY 16, 1942

In order to better understand our contention concerning the consideration to which appellee is entitled by reason of the peculiar facts in this record, we call to the Court's attention the substance of certain undisputed facts which were found by the Commission, and upon which it predicated its order of May 16, 1942, which directly affected appellee, and operated upon its property, rights which are involved in this proceeding; for this purpose, reference is now made to pages 100 to 104 of the Record, from which we summarize the following facts:

Hancock Truck Lines, Inc., of Evansville, and  
Globe Cartage Company, Inc., of Indianapolis, by

joint application filed December 23, 1941, asked for authority under Section 5 for purchase by the former of operating rights of the latter for \$10,000; on June 10, 1940, the Commission had issued an amended certificate to Hancock authorizing operations in interstate or foreign commerce as a motor vehicle common carrier of general commodities (a) over regular routes, serving specified intermediate and off-route points between Evansville and Chicago, Illinois, via Vincennes and Terre Haute, Indiana, between Evansville and Henderson, Kentucky, between Evansville and Louisville, Kentucky, between Vincennes and St. Louis, Mo., between Terre Haute and Indianapolis, Indiana, and between Evansville and Detroit, Michigan, via Vincennes, Indianapolis, Ft. Wayne and Angola; under rights confirmed by the Commission, Hancock also conducted regular route operations between St. Louis and Louisville, via Vincennes, and operated over certain short-cut routes between Evansville and Indianapolis; it was then utilizing substantially more than twenty motor vehicles in its operations; at that time Globe was transporting general commodities in interstate or foreign commerce pursuant to two pending applications filed under the "grandfather" clause; under its application No. MC-3339, it claimed rights as a common carrier, serving all intermediary points, over routes in territory bounded on the east by Buffalo, New York and Pittsburg, Pa., on the south by Wheeling, West Virginia, Columbus and Cincinnati, Ohio, Louisville and Evansville, on the west by St. Louis and Peoria, Illinois, and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pennsylvania; in said proceeding the Commission considered only the operations of Globe as a common carrier and its findings therein were said by it to authorize the purchase only of Globe's rights to operate as a common carrier (R. 100).

The Commission found that by agreement dated November 4, 1941, Hancock would purchase the operating rights of Globe under Nos. MC-3339 and MC-3340 for \$10,000, of which \$100 had been paid as of the date of the agreement, and the remainder would be paid \$2,500 upon approval of the transaction by the Commission, \$2,500 upon final approval by the last of the concerned State Regulatory Authorities, and \$4,900 within ten days thereafter, and that Hancock's stockholders had agreed to contribute sums equal to the purchase price at the times and in the amounts necessary to meet the payments required under the agreement.

Hancock's balance sheet as of September 30, 1941, showed assets aggregating \$109,984; Globe's balance sheet as of the same date showed assets aggregating \$166,153.

With certain exceptions, principally between Evansville and Prospect, Evansville and Indianapolis over certain short-cut routes, and Angola and Detroit, via Coldwater, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive. Both carriers then served Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points. Approximately 65 percent of Globe's traffic consisted of business handled for a forwarding company, and as a result its flow of traffic was unbalanced. As an example, Globe's traffic was heavier west into St. Louis than in the reverse direction, necessitating dead-heading of equipment from that point. Hancock, on the other hand, enjoyed heavier traffic east out of St. Louis than in the reverse direction. Globe did not believe it would be justified in expending additional funds in an effort to develop a

better balanced operation, and, as its functions and facilities substantially duplicate those of Hancock, the desired result could be accomplished through unification of the operations in Hancock. The unification would result in better balanced lading between the common points then served, and in certain instances, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes. Hancock had the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing additional equipment of owner-operators as at present, or by purchasing additional equipment. Savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of \$50,000 annually. No arrangements had been made respecting Globe's equipment, but it was the intention of the parties to dispose of all the assets and surrender its charter for cancellation. Globe's regular employees would be afforded an opportunity to join Hancock's organization. Other competitive common carriers of property then operated throughout the considered territory. The proposed unification is in line with our purpose of encouraging corporate simplification in the interest of economical and efficient transportation (R. 102).

The Commission found that the purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions it found to be just and reasonable, was a transaction within the scope of section 5 (2) (a) and would be consistent with the public interest, and that, if the transaction was consum-

ated, and pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should be entitled to conduct the common-carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and would be entitled to a certificate covering any "grandfather" common-carrier rights which might be confirmed as a result of those applications, which rights were therein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated (R. 104).

The lower court found as a fact that following said findings and order of the Commission of May 16, 1942, appellee, Hancock Truck Lines, Incorporated, in reliance on such findings and order, paid to Globe said \$9,900, the balance of the purchase price for such common carrier operating rights (R. 72); it further found that in reliance upon said findings and order of May 16, 1942, appellee completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as a result of its grandfather applications aforesaid with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission over the routes aforesaid; appellee thereafter continued to operate under said order of unification, and unified the common carrier rights of both of said companies as authorized by the Commission up to the time of the trial, to the extent and in the manner as set out in paragraph 18 of its complaint (R. 72); that is to say, as a result of such unification order of May 16, 1942, up to the time of the trial appellee had built up an annual business between Indianapolis, Indiana, and St. Louis, Mo.,



of approximately 13,200,000 pounds, 60% of which represented tonnage tendered to it by others than freight forwarders; between Louisville, Ky., and Chicago, Illinois, the approximate yearly tonnage was 34,660,000 pounds, 50% of which was that tendered to appellee by others than freight forwarders; from Cincinnati, Ohio, to Chicago, Ill., appellee was handling approximately 5,760,000 pounds of freight per year that was not moving on freight forwarder bills of lading; if that part of the order complained of is enforced appellee will at once be deprived of such valuable operating rights, and it will suffer a loss and damage of approximately \$75,000 per year on account of the loss of revenue on said routes and will destroy appellee's right to receive general commodities direct from the true owners thereof (R. 9).

There was no issue as to these facts in the lower court; at the trial, it was admitted that appellee's business would be taken away from it, and appellants in Cause 448 said they had not raised any question as to these facts in their answers, and asserted that the matter of monetary damage was not in dispute; reference is made to page 92 of the Record, where the discussion arose as to the introduction of evidence by appellee on its allegation of irreparable injury and damage, for the following colloquy:

"Judge Baltzell. You are admitting, are you, that, if this is taken away, it would be taking their business away from them?

Mr. Thomas. Yes, sir; and we do say that, if the Court should find that this final order of the Commission is invalid and the Commission had no power in the premises to make it, it should be set aside. In other words, I think that takes care of this question of specific monetary damage.

Mr. Ward. Well, I don't want to be confronted with a moot question. I want this record to show that we are damaged.

Mr. Thomas. Neither of us raised that question in our answers.

Mr. Weiss. And you agree, now, that we don't have to submit proof on that?

Mr. Thomas. *If the Court finds that this order of the Commission is void, it should be set aside*" (emphasis supplied).

Mr. Thomas represented the Interstate Commerce Commission at the trial (R. 89).

### ESTOPPEL AGAINST COMMISSION

The Commission is bound by the same rules of estoppel which control individuals, and the rights of the parties must be determined upon the fixed principles of justice which govern between man and man in like situations; *United States v. Stinson* (1905), 197 U. S. 200; *Walker v. U. S.* (1905), 139 Fed. 409; *U. S. v. Denver* (1926), 16 Fed. (2) 374 (8 CCA); *State of Iowa v. Carr* (1911), 191 Fed. 257 (8 CCA); as the Court says in the *Stinson* case:

"The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

In the *Walker* case, the court held that:

"When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief

to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case, work an estoppel against the Government."

We believe that if the facts in this appeal involved ordinary parties, and it was shown that appellee had been induced to expend \$9,900 on the representations of its adversary that certain things would be done, and thereafter pursued a course of conduct prescribed by such adversary for a period of years; and, in so doing, changed its position to where its property and business to the extent of \$75,000 per year would be destroyed if the adversary were allowed to change its course, this Court would have no hesitancy in enjoining such adversary from such wrongful conduct; the sovereign should not be permitted to successfully urge such procedure.

The authorities cited on page 19 of appellant's brief are not contrary to our position on this point; in *Cummings, Atty. Gen., et al. v. Societe Suisse Pour Valeurs De Metaux*, 85 Fed. (2) 287, the court properly held that the United States is not bound by the *unlawful action of its officers*, nor is it estopped by the acts of its agents in entering into an agreement which the law does not sanction or permit; in *United States v. City & County of San Francisco*, 310 U. S. 16, and in *Utah Power & Light Co. v. United States*, 243 U. S. 389, this Court held that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit;

we make no point as to these legal propositions; appellant *distinguishes our case* from those thus cited by it when it admits that the Commission acted within its rights in entering its order of May 16, 1942, under the express provisions of Section 5; no one claims that the Commission was not acting within its rights in entering the order of May 16th; the law expressly sanctioned such an order, upon the finding of requisite facts, and such facts were found; rights thus properly granted by the Commission are protected under the principles of estoppel.

It should be noted that *appellant makes no claim that the facts which we have set out would not be an estoppel as between ordinary litigants*; it only urges that estoppel cannot be urged against the Commission and the United States as a matter of law (p. 19 of their brief). We think the facts in this case operate as an estoppel against both the Commission and the United States.

#### **PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES FIFTH AMENDMENT**

The order of May 16, 1942, was made by the Commission pursuant to Section 5 of the Interstate Commerce Act, upon notice and full hearing; such order clearly defined and furnished the foundation for the creation of certain property rights, and directed that certain things must be done by appellee; such property rights can not now be destroyed by the Commission by any order made by it in this proceeding; a hearing and decision under Section 5 can not be confounded and intermingled with a hearing on an application under Section 206; the issues are entirely different; the order entered under Section 5 was very comprehensive, and not only impliedly author-

ized, but directed, appellee to pay Globe \$9,900 for its common carrier operating rights, unify its common carrier rights with those of Globe, and eliminate duplications of traffic, all of which was said by the Commission in that proceeding to be consistent with the public interest; such order can not now be collaterally set aside by the Commission; a change in such order can only be made "for good cause shown", as provided by (9) Section 5; the Commission found that it was "just and reasonable" to encourage appellee to spend its money in the elimination of overlapping functions, and reduce the mileage of empty truck operations, in the "interest of economical and efficient transportation." But what has happened in the meantime to change all of these things which were so commendable on May 16, 1942? Nothing, except in August of 1943, the Commission found that on June 1, 1935, Globe was in fact a common carrier of general commodities as defined by the Interstate Commerce Act, but it was then only receiving freight from freight forwarders; this is the sole excuse of the Commission for writing the order complained of limiting appellee's operations to the receipt of freight from freight forwarders; but its order of May 16th was based upon a finding by the Commission that the proposed unification transaction was "consistent with the public interest" and its "terms and conditions" were found by it "to be just and reasonable" (Section 5 (b)). Before such order of May 16, 1942, can be set aside, or its virility nullified by any subsequent action of the Commission, the appellee is entitled to notice of any hearing to be had by the Commission for any such purpose and entitled further to be fully heard thereon. It has had no such notice and no hearing, our position being that such an action is not properly included within the application for a certificate under the grandfather clause of Section 206, and was not



within the issue tendered by Globe's application; consequently, the present order of the Commission will clearly deprive the appellee of its property without due process of law, in violation of the Fifth Amendment. It has had no notice and no opportunity to be heard upon the question as to whether it is consistent with the public interest, and just and reasonable for it to go back to, and hereafter occupy, the unfortunate financial dilemma from which it, under the unification order of the Commission, extricated Globe in 1942; pursuant to which order it has built up a substantial business, and before appellee can be compelled to re-establish duplications in the transportation service, and the dead-heading of empty trucks, which useless and unnecessary acts were eliminated by the order of May 16th, it must have a lawful hearing on those issues and upon the conditions in relation thereto as they are found to exist at the time of such hearing, upon the theory of reasonableness and consistency with the public interest. The Commission can not destroy these rights by an indirect or collateral order.

In *McClellan Trucking Co.* (1943), 321 U. S. 67, this Court upheld a unification order made by the Commission because it had found and determined that the proposed consolidation was "consistent with the public interest," and the terms and conditions thereof were "just and reasonable," and that these were matters which were peculiarly within the power of the Commission to determine. On May 16, 1942, the Commission found and determined that these salutary statutory conditions existed as to the consolidation of Globe's common carrier rights with those of appellee; the question now before the Court is:

Can the Commission, after having authorized such unification on such findings and conclusions,

enter a collateral order which will destroy the improved transportation service obtained thereby, and which will confiscate and destroy appellee's property!

We most sincerely urge that the Fifth Amendment forbids such action by the Commission, and before any such changed order can be entered by it there must be proper notice given to appellee, and an opportunity to be heard, and there must then be a finding by the Commission that such changed order will be consistent with the public interest, and likewise be just and reasonable.

This Court summarized certain of the matters which the Commission found had properly entered into the consolidation order in the *McClean* case as follows:

"The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to more efficient use of equipment and save motor fuel. Terminal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced."

These matters bear especially upon whether the merger is consistent with the public interest. It is equally important that the findings show that the order will be "just and reasonable"; this provision is primarily for the protection of the property rights of the carriers involved; conceivably, it might be consistent with the public interest to require the carrier to dead-head trucks, travel with empty vehicles at times, and maintain some duplications of facilities, but this would not justify the Commission in making an order compelling it to do so, unless it was also found that it was a just and reasonable requirement.

In the instant case, the Commission made and entered consolidation order on May 16th, 1942; appellee thereupon invested its \$9900 on the strength of such order; it unified the service; it improved the transportation; gave greater efficiency of operation; avoided duplications; reduced the empty truck miles traveled; balanced the traffic, and enhanced the stability and safety of the public service rendered; in so doing, and as expected and intended by the Commission (as it was in line with the Commission's purpose of encouraging corporate simplification in the interest of economical and efficient transportation), appellee built up a common carrier transportation service, which, at the time the judgment was rendered below, amounted to many thousands of dollars annually, and moved each year 7,920,000 pounds of freight between Indianapolis and St. Louis, 17,330,000 pounds between Louisville and Chicago, and 5,760,000 between Cincinnati and Chicago, none of which was received by it from freight forwarders, and all of which is to be wiped out, if the order complained of herein is permitted to stand.

The order of May 16, 1942, is a vested property right of appellee, and it cannot be taken away from it, except in the manner provided by law; appellee cannot be divested thereof by any hearing or proceeding had under Section 206; the issues of "consistency with the public interest" and whether it is "just and reasonable" to thus destroy its business are not within the purview of Section 206, and such issues must be presented, heard upon notice, and properly decided before such vested property rights and its business shall be taken away from it. We believe that as long as the order of May 16th remains in force, and it will so remain until a direct attack is made thereon, it confers contractual rights which are vested in appellee,

and which cannot be taken from it except in the manner provided by law; the Fifth Amendment forbids such procedure; *Lynch v. United States* (1933), 292 U. S. 571.

**PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES SECTION 206 (a)**

The Commission found that Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935; transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, with immaterial exceptions; it found that Globe was a common carrier by motor vehicle and that it was entitled to authority to continue operations as such; it found that it was without power to restrict or limit Globe's operations in a manner which would change its status from that of a common carrier (R. 68); having found such facts, it was the mandatory duty of the Commission to issue an unlimited certificate to appellee; appellee was either a common carrier or it was something else; the Commission found that it was a common carrier, and it had the power to so find; the Commission had no lawful right to deny appellee the certificate which Congress has said it was entitled to, pursuant to that part of Section 206 (a) which reads as follows:

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings" (emphasis supplied).

Just how Congress could have couched the duty of the Commission in plainer language is hard to understand: if the applicant was a bona fide common carrier, no further proceedings were proper to determine whether it was at that particular date receiving freight only from a portion of the public known as freight forwarders (a shipper and consolidator of freight for the general public); if it was a common carrier, it was engaged in the transportation by motor vehicle in interstate or foreign commerce of property for compensation, and under the law it had the right to thereafter expand its business as such to include the transportation of freight tendered to it by all shippers; this was not only recognized by the Commission as being proper in its order of May 16, 1942, but the Commission found it was advisable to augment the common-carrier rights of Globe by unifying them with the common-carrier rights of appellee; under these undisputed facts, the Commission had no lawful right to place the limitation complained of in appellee's certificate.

In *United States v. Maher* (1939), 307 U. S. 148, this Court said:

"But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time'."

The facts thus referred to by this Court were found by the Commission to exist, and it had no authority, under 206 (a) to limit the certificate to freight moving on bills of lading of freight forwarders. It was required to issue



a certificate as a common carrier—"without further proceedings."

**PART OF COMMISSION'S ORDER COMPLAINED OF  
IS VIOLATIVE OF SECTION 216 (d)**

The Court found that appellee, as a common carrier of property by motor vehicles, has and does provide safe and adequate service, equipment, and facilities for the transportation of general commodities in interstate and foreign commerce, and has established, observed, and enforced just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property, and has fully complied with all the rules and regulations of the Commission in relation thereto in so far as they were in effect at that time (R. 70).

The Commission found that appellee was a common carrier, both in 1942 and in 1943; being in fact a common carrier, appellee is prohibited by Section 216 (d) from giving any undue or unreasonable preference or advantage to any person in any respect whatsoever; it could not accept freight from one class of shippers, and decline it from other classes; it could not decline to receive freight properly tendered to it by owners of property as distinguished from agents or freight forwarders; not only its rights, but its duties, are fixed by law, and for a violation thereof it is subject to the imposition of penalties; the Commission can not lawfully, under Section 216 (d), place appellee in such inconsistent position.

## **VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS CAPRICIOUS**

No reason other than mere caprice can be advanced for that part of the order complained of; on May 16, 1942, the Commission entered a solemn finding that the handling of freight by Globe which was restricted to freight-forwarder business, unbalanced the flow of traffic of Globe, and that it would have cost Globe approximately \$20,000 to overcome such situation in 1942; it found that by the unification of Globe's traffic with the appellee's traffic, economical transportation would be supplied, duplications of service avoided, and the combination of these would be consistent with the public interest. (R. 102-103-104.)

Now, it proposes to compel appellee, as a common carrier, to go back to the carrying of freight tendered only by freight forwarders, and thus lose its money, have its business and property destroyed, completely disorganize the economical transportation which it found would result from unification, and wholly disregard its former finding that such unification would be consistent with the public interest; such an order, without facts and reason being found to support it, must fall within the realm of mere caprice, and should not stand; it will place appellee in a worse position than Globe occupied in 1942; Globe was then losing money and carrying on an unbalanced business with only 65% of its commodities being received from freight forwarders; but appellee can accept no property at all except from freight forwarders; such conduct seems to emphasize the lack of apparent motivation, and at least implies wantonness; the void portion of the Commission's order complained of is capricious, and should be enjoined.

## VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS UNREASONABLE

The limitation complained of is clearly unreasonable; if enforced, all of the business which appellee has built up under the unification order of May 16, 1942, will be destroyed; appellee will be compelled to go back to a transportation business which was, and will be, unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it will be compelled to duplicate operations over routes covered by its other certificate; it must give a duplicate operation between Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, Chicago, and other points; the saving in overlapping functions, including terminal and pick-up and delivery facilities, reduction in truck miles operated, and through increasing the use factor of vehicles transporting heavier loads, and which were estimated by the Commission to be in excess of \$50,000, will all be lost to appellee (R. 70-71-72).

In 1942, the Commission found that it was "just and reasonable" for appellee to pay Globe \$10,000 for the common-carrier operating rights involved in this proceeding; it found that it was "just and reasonable" to eliminate duplicate terminal facilities then maintained by Globe and appellee; it found that it was "just and reasonable" to eliminate Globe's unbalanced traffic which was caused solely by the fact that 65% of its business was received from freight forwarders; it found that it was "just and reasonable" to avoid the dead-heading of equipment by Globe; it found that it was "just and reasonable" to save \$50,000 annually by the consolidation of overlapping functions, reduction in truck-miles operated empty, and the factor of operating vehicles with heavier loads;

it found that all of these things were "in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation"; it found that all thereof would "be consistent with the public interest" (R. 103-104). If these matters were "just and reasonable" then, they are just and reasonable now; if they are just and reasonable now, then the limitation of which we complain is a most astounding and startling exhibition of unreasonableness, because it will force appellee back to the unfortunate position of Globe, without restoring the \$10,000 which appellee paid to Globe, and compel appellee to carry on the losing business of handling freight tendered to it only by freight forwarders, going back once more to dead-heading, duplicating routes and services, moving partially loaded trucks, and traveling many unnecessary empty truck-miles.

We submit that the Commission has neither power nor authority to promulgate such an unreasonable order, and thus destroy the business and property of appellee.

When all of the facts in this case are considered, it will be found that the part of the order complained of is so capricious, arbitrary, and unreasonable as to shock the conscience of the Chancellor, and the order should not stand.

#### **JUDGMENT OF DISTRICT COURT IS NOT VIOLATIVE OF COMMISSION'S ADMINISTRATIVE FUNCTIONS**

On page 14 of its brief appellant makes the point that the District Court erred in setting aside the portion of the Commission's order containing the limitation to commodities moving on bills of lading of freight forwarders, while leaving the rest of the order in force. This was

proper practice, and did not amount to the exercise of an administrative function conferred on the Commission by Congress; the Commission's order was clearly divisible; the void and illegal part could be very readily separated from the valid portion; the Commission found appellee to be a common carrier within the provisions of the grandfather clause in section 206 (a); it was thereupon its mandatory duty to issue appellee a certificate, without limitation, and without further proceedings; having failed to comply with the law, and the limitation being void, appellee was clearly within its rights in rejecting the void part of the grant, and accepting the valid part. This method of procedure is clearly established and recognized in *United States v. Chicago, M. St. P. & R. Co.* (1930), 282 U. S. 311, wherein the court says:

"It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

### **REMAND IS NOT PROPER REMEDY**

But, on page 4 of its brief appellant suggests that if the Commission's order was based upon an improper application of legal standards, the case should have been remanded to the Commission for further proceedings. All that the Commission could have done, upon such remand would be to remove the objectionable limitation from appellee's certificate: this the court could do as well as the Commission; no complaint was made as to the facts actually found by the Commission; neither party to this



action claimed in the lower court that the Commission had not found as a fact that appellee was a common carrier within the purview of the grandfather clause; it was conceded that the Commission also found that appellee had the right to continue operations as a common carrier, and that the Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier; the facts in relation to and surrounding the making of the Commission's order of May 16, 1942, are not in any manner in dispute; our claim is that the Commission misapplied the law applicable to an uncontroverted and undisputed state of facts; in such situation, we think it would be highly improper to remand the cause to the Commission, and the lower court certainly would have been derelict in its judicial duty if it had shirked the responsibility of enjoining a void order on undisputed facts; in applying the law to the facts found by the lower court, no further weighing of evidence was required; no administrative function remained; no intricacies of the transportation problems were then involved; all questions of fact were settled; no suggestion is made by appellants that any further facts were to be found by either the court or the Commission; in fact, nothing remained for the Court to do but to apply the fixed principles of justice and law which govern between man and man in situations of this character; this is what the court did, and there is no reason for remanding the cause to the Commission for further proceedings. In the *Carolina Freight Carrier's Case*, supra, this Court held that it was no intrusion into the administrative domain of the Commission for the Court to strike down the void limitations which were placed in the certificate by the Commission; it was said to be an

insistence upon the observance of those standards which Congress has made "prerequisite to the operation of its statutory command"; that cause was not referred back to the Commission. In the *Chicago M. St. P. & P. R. Co.*, supra, the cause was not remanded, but the order was enjoined.

Furthermore, upon a remand of this case, the Commission will have no power in this proceeding to enter any order which will change its order of May 16, 1942.

### WAIVER

But appellant urges on page 20 that appellee waived objection to the restriction limiting it to the carriage of traffic moving on bills of lading of freight forwarders.

Our position as to such alleged waiver is:

(1) The right and duties imposed upon plaintiff as a common carrier impressed the matter of limitation of such rights and duties with a public duty which could not be legally waived by plaintiff, as such limitations are governed and controlled only by legal provisions and requirements; a common carrier can not waive provisions concerning its duty to the shipping public, as such waiver is prohibited by law.

Title 49 U. S. C. A., Sec. 316.

(2) It is contrary to public policy to permit the Commission to promulgate a void order, one which will cause plaintiff to sustain irreparable damage, and then allow the Commission to urge that the plaintiff waived its right to object to such illegal order; the Fifth Amendment provides that plaintiff shall not be deprived of its property

without due process of law, and every reasonable presumption should be indulged against such waiver.

*Hodges v. Easton*, 106 U. S. 408.

We urged below, and repeat now, that it is improper for the Commission to set up a void order, and one which it is admitted will confiscate appellee's property, and then be heard successfully to urge that appellee waived its legal right to present such void order to a court for its injunctive relief (R. 98). Such procedure is clearly contrary to public policy. Such facts do not constitute a waiver.

(3) No issue was properly tendered of any waiver by the appellee; we objected to the introduction of evidence offered in support of such claim of waiver, because the answer does not contain the facts necessary to present such issue (R. 98); the statements in the answer which attempt to present such issue are nothing but conclusions of law of the pleader, with no facts whatever to support the same (our objections to defendant's Exhibit 5, R. 98).

Facts constituting an estoppel (or waiver) must be pleaded specially, in order that the question of whether a party is estopped to act in a certain manner may be put in issue; *Town of St. John v. Gerlach* (1926), 197 Ind. 289; 150 N. E. 771;

"To claim an estoppel (or waiver) in so many words is merely to state a conclusion of law"; *City of Ironton v. Harrison Const. Co.* (1914), 212 Fed. 353 (6 CCA).

(4) Before there can be a waiver, there must be an existing right; appellee could not waive a right which did not exist; the Commission had denied its right to receive freight generally from shippers, and appellee gave up

nothing in connection with its claim to the right to transport general commodities; consequently, there was no waiver; Vol. 27, R. C. L., Sec. 5, p. 908.

(5) To make out a case of waiver of a legal right, it must be shown that such waiver is supported by a valuable consideration, or the fact relied on as a waiver must be such as to estop the party from reasserting the matter so alleged to have been waived; no such facts are pleaded, proved or claimed by appellants in this case.

*Victor Products Corp. v. Yates* (1932), 54 Fed. (2) 1062 (4 C. C. A.);

*Hasler v. West India* (1914), 212 Fed. 862 (2 C. G. A.);

*Hunter Milling Company v. Koch* (1936), 82 Fed. (2) 735 (10 C. C. A.).

(6) The act relied upon to prove waiver must be shown to have been voluntarily done, with intent to waive, and in the absence of particularly urgent circumstances; the conclusion of waiver asserted in the answer was in connection with the issue then pending before the Commission wherein the appellee was seeking authority over approximately 83 different routes (including alternates), approximately 60 of which had been denied by the Commission; in addition to denying such routes, the Commission had restricted appellee to the receipt of freight on the remaining 23 granted routes from freight forwarders only; in such situation, the appellee was compelled to weigh and evaluate the ultimate rights which would inure to it by the further action of the Commission, and for procedural purposes solely in connection with its application for reconsideration, it took the position that it preferred to have a grant over the approximate 83 routes; it was unsuccessful in its position; the most that can be

said is that for the purpose of the reconsideration, appellee proposed that if its 83 routes should be granted, it would give up its right to contest further the restriction which the Commission placed upon it; but it was unsuccessful, and there is no consideration for the claim now that it waived its right to contest such restriction in this subsequent independent action; that the alleged waiver was not voluntary, and was expressly conditioned upon its receipt of a certificate over the 83 routes, is plainly disclosed by the language used in connection therewith, appearing on page 143 of the Record, where appellee urged that:

*"To maintain our very life as a carrier, as a minimum, in view of the curtailment and limitation to the hauling for freight forwarders only, we believe that we are entitled to no less than the right to use all convenient routes as set forth in Exhibits 30 and 31."*

Thus, the failure of the Commission to grant appellee a certificate over the 83 routes applied for, very clearly released the appellee from its suggestion that it would contest no further on the question of restriction; in other words, appellee was unsuccessful in its position, the Commission yielded no ground, and there is no basis for the claim of waiver.

*Bowerman v. Detroit Free Press* (1939), 287 Mich. 443, 283 N. W. 642.

**COMMISSION DID NOT FIND THAT GLOBE WAS  
NOT HOLDING ITSELF OUT TO TRANSPORT  
PROPERTY FOR ALL SHIPPERS**

Appellant argues that the Commission's finding that during the "grandfather" period appellee's pred-



ecessor in interest transported no commodities other than those moving on bills of lading of freight forwarders and this statement can not be challenged by appellee; but this does not reach our question; however, the Commission itself challenged it by its finding and conclusion in its order of May 16, 1942, that Globe was transporting only 65% of its total for freight forwarders; we say the Commission found as a fact that appellee's predecessor in interest was a bona fide *common carrier by motor vehicle* of general commodities, prior to, on, and ever since June 1, 1935, and it found as a fact *that it could not restrict its services to particular shippers, and that it was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier* (R. 68).

The term "common carrier by motor vehicle" is defined by Clause (14), Section 203, Part II of the Interstate Commerce Act to be any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of property for compensation; it must be assumed that the Commission made the above finding advisedly and with an understanding of such definition; the Commission made no finding that appellee's predecessor was not holding itself out to the general public to engage in transportation by motor vehicle in interstate or foreign commerce of property for compensation; in the absence of a finding of this character, it can not now be said that simply because it had no shippers on June 1, 1935, except a freight forwarder, it must now be limited to receiving freight from freight forwarders in the future; it did have other business, because the Commission found on May 16, 1942, that 65% of its business was received from a freight forwarder,

and the balance from general shippers; having been a bona fide common carrier by motor vehicle on June 1, 1935, it can not be limited to the exact number of customers it had on that date; nor can the shippers which it was then serving be designated as a class, and become the only class which could be served by appellee. As this Court said in *United States v. Carolina Freight Carriers Corp.*, (1942), 315 U. S. 475, it is not proper to freeze the operation of appellee into the precise pattern of its predecessor's activities on June 1, 1935; especially is this true in view of the unification order of the Commission of May 16, 1942.

### SUBSTANTIAL PARITY

The "substantial parity" referred to in appellant's brief has no relation to or connection with the question at hand, for, in none of the cases cited did the Court have before it a previous order of the Commission affecting the rights of the same parties such as the one of May 16, 1942; in the *Alton* case the question was whether the applicant was a bona fide operator on June 1, 1935, it being shown that he was operating on highways in defiance of state law; the Court sustained the Commission's finding that he was not a bona fide operator; in the *Carolina* case, the court enjoined the Commission from placing unauthorized limitations in the certificate, such as the elimination of commodities, which, though of the same general class as the others, had been carried before, but not after June 1, 1935, and the limitation to those commodities which prior to June 1, 1935, had been carried in substantial amounts and with a degree of regularity; we think the Court held in the *Carolina* case that limitations such as we complain of herein are unlawful;

to require appellee to go back and haul empty and partially loaded trucks, as Globe was doing in 1942, and carry on Globe's former unbalanced transportation system, will drive the enterprise of appellee to the wall, and ruin it; this is what this Court in the *Carolina* case concluded could not be done by the Commission; the *Noble* case related to a contract carrier, where a different statutory standard is the guide for the Commission, the applicant wanted to haul certain commodities for any one who desired to use its service, and the Court approved the principle that a highly specialized contract carrier of fresh meats, canned goods, and dairy products for particular concerns could not properly have his business extended *to that of a common carrier of general commodities*; in the *Crescent* case, the Court held that to grant the applicant the right to change his business from sedans to that of carrying passengers by bus would alter the position in the transportation system which he occupied on June 1, 1935; none of these cases had anything to do with an order like the one of May 16, 1942; *and none of them had anything to do with the division of shippers into different classes; property may be classified, but shippers of commodities can not be arranged in classes consisting of owners in one class and agents or freight forwarders in another* for the purpose of limiting the rights of a common carrier to the hauling of only general commodities tendered by those classified as agents or freight forwarders; *a common carrier can not be limited in transportation of commodities tendered to it only by agents*; a common carrier has the legal right, and it is under a legal duty, to contract with and receive general commodities either from ~~the~~ owner thereof, or his agent, and the order of the Commission restricting such common carrier to the receipt of

general commodities tendered only by agents, is an illegal, unjustifiable, and arbitrary limitation upon the enjoyment by appellee of its property rights; *New State Ice Co. v. Liebman* (1932), 285 U. S. 262; *Covington Stock Yards Co. v. Keith* (1890), 139 U. S. 128; such limitation is prohibited by Section 216 (a) and (d), Part II of the Interstate Commerce Act, Section 316, Title 49 U. S. C. A.

On page 19 appellants say that Section 208 (a) authorizes the Commission to make the limitation found in the order complained of; we do not agree with this statement; the only terms, conditions or limitations that can be placed in a certificate are those which "the public convenience and necessity may from time to time require"; appellant makes no claim that the public convenience or necessity require any such limitation, and its contention in this regard but further emphasizes the fact that the Commission did not properly apply the law in this case. Even though there could have been a question as to "the convenience and necessity", the Commission was nevertheless mandated by the statute to issue the certificate to appellee "without further proceedings" (Section 206).

#### FINDING NO. 14

On page 30 of appellant's brief complaint is made as to Finding No. 14 of the lower court, it being said that there was no evidence to prove the matters set out therein; Finding 14 covers paragraph 16 of our complaint (R. 7); there was no dispute as to the facts involved in this Finding; the answering defendants said the allegation was immaterial and at the trial took the same position; from the discussion that took place the court was clearly within its right in adopting Finding 14; the appellant in this appeal

filed no answer, and tendered no issue; it took no part in the discussion and did not raise this question in its assignment of errors nor in its points to be relied upon.

### **FINDINGS NOS. 15, 16, 17, and 18**

Appellant urges that the court exceeded its jurisdiction as to Findings No. 15, 16, 17 and 18 (R. 70, 71, 72); it made no request of the court below to change these or any other Findings; these particular Findings are based upon paragraphs 13 and 18 of our complaint (R. 5-8, 9), which relate to the facts concerning the unification order of the Commission of May 16, 1942; it is not claimed by appellant that the Findings do not set out the facts; it is said that such facts were not in issue; if such facts are immaterial, they can do the appellant no harm; there are direct allegations in the complaint concerning the facts set out in such Findings (R. 5-8, 9), and appellee was entitled to appropriate Findings, if supported by the evidence, to sustain its theory of the cause of action.

### **COURT BELOW DID NOT EXCEED ITS JURISDICTION**

Appellant has not accurately stated the full measure of appellee's attack on the order of the Commission on page 28 of its brief.

The evidence introduced before the Commission was not introduced at the trial below; the findings and order of Division 5 to the effect that an unlimited certificate should issue to appellee is in the Record (R. 22-89); the finding and order of the Commission of August 3, 1943, is in the Record (R. 40-46-89). From an examination of these



instruments, the lower court found that *the Commission had failed to find:*

A. That the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and necessity (Section 208).

B. That it failed to find that it would be consistent with the public interest to place such restriction in said order (Section 5).

C. The Commission failed to find that good cause exists for changing its order of May 16, 1942 (Section 5).

D. The Commission failed to find that it is just and reasonable to place such restriction in such certificate (Section 5).

The court further found:

E. That part of the order complained of is not sustained by any fact found by the Commission.

F. That part of the order complained of has no rational basis for its support.

G. That part of the order complained of is discriminatory against appellee.

H. That part of the order complained of is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of the appellee as a common carrier of general commodities by motor vehicle for compensation.

I. That part of the order complained of will deprive plaintiff of its rights and property without due process of law (Finding No. 19, R. 73).

These are all factual matters, and, strange as it may seem, neither the appellant in this appeal, nor the appellants in Cause No. 448, have pointed out in their briefs where the lower court has made any mistake as to the facts actually found by it; if the Commission did find the facts which the lower court says are missing, as recited in A, B, C, and D, it would be appropriate for appellants in either of these appeals to point out the place in the Record where they may be found. The matters referred to in E, F, G, H, and I, are undoubtedly predicated upon an examination of the findings and order of the Commission of August 3, 1943, and a comparison thereof with the order of the Commission of May 16, 1942; such examination clearly discloses the discriminatory character of that part of the order complained of, portrays its arbitrary nature, demonstrates its unreasonableness, and boldly emphasizes the sheer caprice which has entered therein; it is admitted by all parties that the part of the order complained of will destroy appellee's business and property.

There is only one conclusion to draw from these undisputed facts: that part of the order complained of is void, and should be stricken out of the certificate.

**CONCLUSION**

We believe this Court has no jurisdiction to decide this case upon its merits; but, if the Court concludes otherwise, we sincerely urge that the judgment should be affirmed.

Respectfully submitted,

JACOB WEISS,  
518 Insurance Building,  
8 East Market,

ALBERT WARD,  
318 Insurance Building,  
8 East Market,

FERDINAND BORN,  
718 Chamber of Commerce Bldg.,  
All of Indianapolis, Indiana,

*Attorneys for Appellee.*



# SUPREME COURT OF THE UNITED STATES.

Nos. 448 and 449.—OCTOBER TERM, 1944.

United States of America and Inter-  
state Commerce Commission, Ap-  
pellants,

448

vs.

Hancock Truck Lines, Inc.

Regular Common Carriers Confer-  
ence, Appellant,

449

vs.

Hancock Truck Lines, Inc.

Appeals from the United  
States District Court  
for the Southern Dis-  
trict of Indiana.

[April 23, 1945.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The appellee is a motor carrier. With the approval of the Interstate Commerce Commission it acquired the operating rights of Globe Cartage Company, another such carrier, which then had pending before the Commission an application for a certificate of convenience and necessity under §§ 206(a) and 209(a) of the Interstate Commerce Act.<sup>1</sup> The appellee prosecuted the application as Globe's successor to obtain a certificate authorizing the exercise of Globe's so-called "grandfather" rights, that is, to continue Globe's operations as they were conducted July 1, 1935.

The Commission made an order awarding a certificate to appellee as a common carrier, but for less than all the routes embraced in the application and restricting appellee's operations to traffic moving on the bills of lading of freight forwarders.<sup>2</sup> The record discloses that the appellee filed a petition for reconsideration, in which it pressed for amendment of the order as respects the routes permitted, but waived objection to the restriction of its traffic to service of freight forwarders. It stated: "We do not challenge, nor do we complain against, the restriction to serve only freight forwarders." There is more to the same effect. The Commission denied the petition.

<sup>1</sup> 49 U. S. C. §§ 306(a), 309(a).

<sup>2</sup> 41 M. C. C. 313; 42 M. C. C. 547.



The appellee brought suit<sup>3</sup> to set aside and enjoin only so much of the Commission's order as restricted its operations to traffic moving on bills of lading of freight forwarders. A district court of three judges heard the case, and issued a permanent injunction as prayed. One of these judges allowed an appeal to this court on a petition filed by the appellants more than thirty, but less than sixty days after entry of the decree. The appellant in No. 449 intervened before the Commission in opposition to the appellee's application, and was permitted to intervene as a defendant in the court below. No circumstance differentiates its status from that of the appellants in No. 448, and what is said concerning that case may be taken as applicable to No. 449.

The appellee moved to dismiss on the ground that the appeal was not timely taken and was improperly allowed by a single judge. We postponed the question of our jurisdiction to the hearing on the merits. After argument and upon consideration we find ourselves in the anomalous position that whereas we hold we have jurisdiction, we cannot pass upon the substantive question of the statutory power of the Commission which is the ground of appeal.

*First:* Since the appeal is from the final decree of a statutory court of three judges, and not from the entry of a preliminary injunction the period for taking an appeal is sixty days,—not thirty days as appellee contends.

When by the Act of October 22, 1913<sup>4</sup> the Commerce Court was abolished and its jurisdiction transferred to district courts, definite provision was made for direct appeal to this court, within thirty days, from an order granting or denying an interlocutory injunction in a suit to set aside an order of the Commission. In a later sentence the Act declares "A final judgment or decree of the district court may be" likewise reviewed "if appeal . . . be taken . . . within sixty days" after entry. The appellee's contention, as we shall see, rests on the assumption that when the Act speaks of a final decree, it is addressed to final decrees in cases other than those brought to set aside orders of the Commission. But we think this reading incorrect. The paragraph as a whole deals with the same type of suit.

On this erroneous assumption the appellee insists that when the Act of February 13, 1925<sup>5</sup> restricted direct review of district court

<sup>3</sup> Pursuant to 28 U. S. C. §§ 41(23), 43-48.

<sup>4</sup> 38 Stat. 208, 219-220.

<sup>5</sup> 43 Stat. 936.

judgments in this field by repealing various earlier legislation, but saving from repeal "so much" of the Act of 1913 "as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders" of the Commission, the sentence of the earlier Act applicable to final judgment was repealed because it did not deal with judgments in suits to set aside Commission orders. The argument is, to some extent, based on the fact that when the United States Code was compiled the sentence of the Act of 1913 dealing with appeals from interlocutory injunctions became § 47 of Title 28 and the sentence dealing with appeals from final judgments was omitted from the Title. The omission was corrected in 1934 by inserting the latter sentence as § 47a.<sup>6</sup>

The face of the statutes, the uniform practice of this court<sup>7</sup> and the legislative history<sup>8</sup> make against the contention that appeals from final decrees in the class of cases in question must be taken within thirty days.

*Second.* We hold the objection that appeal was allowed by but one of the three judges who composed the district court is untenable. The Act of October 22, 1913 (*supra*) requires that in a case such as this both the hearing in respect of an interlocutory injunction and the final hearing shall be by three judges.<sup>9</sup> It says nothing as to who shall allow an appeal. Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court. Our past practice has apparently sanctioned such an allowance. But if the proper procedure was formerly a matter of doubt, such doubt has been removed.

Section 3 of the Act of April 6, 1942<sup>10</sup> provides that in such a case as this a single judge may "enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time", with a proviso not here relevant. There is a further proviso that his action shall be sub-

<sup>6</sup> A like correction was made in § 345.

<sup>7</sup> Reference to the records of the court discloses that it has repeatedly entertained appeals taken more than thirty but less than sixty days after entry of final judgment.

<sup>8</sup> Hearings H. R. 8206, 68th Cong., 1st Sess., p. 15; Senate Report on S. 2060, 68th Cong., 1st Sess., p. 16.

<sup>9</sup> See 28 U. S. C. § 47.

<sup>10</sup> 56 Stat. 198, 199; 28 U. S. C. § 792.

ject to review "at any time prior to final hearing", by the court as constituted at final hearing. This, however, is obviously inapplicable to action taken subsequent to final hearing. Rule 72 states that an appeal to this court from a district court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 36 of this court authorizes a single judge of a district court to grant such an appeal.

*Third.* The court below held that the Commission erred in granting appellee a certificate as a common carrier and limiting its right thereunder to carriage of goods consigned by freight forwarders. This is the holding the appellants challenge. We are of opinion that the record precludes consideration and decision of the question.

As has been stated, the appellee in its petition for reconsideration by the Commission, expressly waived objection to that portion of the order which limited operations to traffic moving on bills of lading to freight forwarders. The Commission's answer to the complaint in the district court recited the filing of that petition, and alleged that in it "the plaintiff limited its objections to said report and order, to the Commission's prescription of the routes over which operating authority was granted therein, expressly waived objection to, and did not challenge or complain against the restriction of the transportation authorized to commodities consigned by freight forwarders and gave up all claim to the right to transport general commodities not so consigned." To this answer the appellee filed a reply consisting of one paragraph in which it denied the allegation above quoted, without explanation or elaboration.

The Commission and the United States filed in the court below a request for findings of fact which included a requested finding reciting the filing of the petition for reconsideration, and stated the "sole error alleged against the Commission was that it granted authority for operation only as to a portion of the routes and between some of the points and places specified in the application. In said petition the plaintiff further stated that it did not challenge nor complain against the restriction of the service authorized to the transportation of commodities which are moving on bills of lading of freight forwarders." The court made no such finding.

The only assignment of error which may be said to attack the failure so to find is one couched in general terms. It is: "The District Court erred . . . 4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants."

Putting to one side the question whether such an assignment is too general and broad to support a challenge to the court's failure to find as requested, and despite the fact that, neither on brief nor in oral argument, did the appellants' counsel press for reversal on that ground, we think the district court committed reversible error, of which we must take note, in passing on the merits of the case made by the appellee.

It was manifestly improper to reverse the Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected but acquiesced. The record disclosed this situation, the defensive pleading relied upon it, and the court was asked to dismiss because of it. The complaint should have been dismissed. The judgment is reversed.

Mr. Justice BLACK concurs in the result.